(1)

89-564

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MAURICE AND DOLORES GLOSEMEYER, et al.,
Petitioners,
vs.
MISSOURI-KANSAS-TEXAS RAILROAD, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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109 pp

QUESTIONS PRESENTED

The questions in this case, presented in a different procedural posture, are now pending before the Court in *Preseault v. ICC*, No. 88-1076 (Certiorari granted April 24, 1989; oral argument set for November 1, 1989), regarding the Constitutionality of 16 USC §1247(d) (the "rails-to-trails" scheme).

1. With Certiorari granted in *Preseault*, should Certiorari be granted in this case (or should consideration of Certiorari be deferred pending a decision in *Preseault*) either to:

- ensure a result compatible with this Court's decision in *Preseault*, or
- provide a case which raises the same Constitutional issues as *Preseault*, but in a different procedural posture, if *Preseault* is determined not to be the appropriate vehicle for this Court's adjudication (as happened during the last decade with other regulatory taking cases)?

2. When Congress enacts a statute which purports to undo settled state property law, by an after-the-fact redefinition of abandonment of an easement or by pre-empting state property law regarding the abandonment of easements, does the statute violate the Fifth Amendment's Taking Clause?

3. When Congress passes a law which effects an unconstitutional taking of private property for public use and prohibits the expenditure of any funds unless expressly appropriated by Congress, is declaratory or injunctive relief an available remedy, or is the property owner restricted to, or even permitted, an action for compensation?

4. Is the "railbanking" concept a smokescreen for an unconstitutional taking of property for other (non-rail) public use when use of the program *must* be

preceeded by an ICC finding that the right-of-way is *not needed* for future railroad use, inclusion of an abandoned right-of-way in the trail program is solely at the discretion of state agencies or private groups, not the Interstate Commerce Commission, and the "rail-to-trail" conversion decisions have nothing to do with potentially reactivating rail service?

5. Does the deferential standard of review used in this case by the District Court and the Court of Appeals conflict with the standard of review announced in *Nollan v. California Coastal Commn.* (1987) 483 US 825, *i.e.*, careful scrutiny of government actions which take private property?

6. If an otherwise rational and valid Congressional enactment takes private property for public use without compensation, may the enactment be invalidated as violating the Taking Clause of the Fifth Amendment?

7. When Congress passes a law which retroactively alters the terms of contracts between citizens in a way which transfers property rights from one group of citizens to the public for public use, has that Congressional impairment of contract obligations denied the holders of the contract rights substantive due process of law?

8. May a state agency, pursuant to authority purportedly granted by a federal statute, act without restraint to violate the Just Compensation Clause of the Fifth Amendment or the Impairment of Contracts Clause of Article 1, §10 of the Constitution?

PARTIES TO THE PROCEEDING

The parties are:

Plaintiffs (Petitioners):

Maurice and Dolores Glosemeyer; Fred and Alwera Brodbeck; Richard and Esther Burgess; John and Marjorie Dohr; Clarence and Onita Duenke; Ada Haase; Roy and Phyllis Haase; Wayne and Maureen Heck; Bernard Hellebusch; Elmer and Regina Hellebusch; James and Patricia Hellebusch; Mrs. Bernard Moellering; Alvin Roewe; Werner Roewe; James and Carla Schwoeppe; Donald and Delores Vitt; Jay and Nancy Walk, Jr.; Clarence Bergman; Harold Blaylock; Maurine Bluhm; Clara Boessen; Ralph and Mildred Brandt; Anne Buckley; Roy Cary; Kenneth and Loretta Burre; Walter and Helen Burre; Albert and Esther Dickson; Charles Dilthey; Denis Engemann; Gerald Engemann; Bernard and Geraldine Eichelberger, Sr.; Glen and Eleta Eichhorn; Sidney and Nadine Eldringhoff; Irven and Margaret Ewing; Hattie Farris; Bruce Florea; Andrew and Emilie Gerke; Anton and Alice Gerke; Herbert Gerke; Roy and Helen Gramlich; Clifford and Rosaline Haid; Norma and Edward Hasselman; Erwin and Alberta Heck; Linda and Gordon Heck; Marie and Leroy Heidbreder; Earl and Gladys Heitmann; Gary and Patty Heldt; Randy and Kendall Kircher; Leroy Kircher, Jr.; John and Barbara Knaus; Randall Kollmeyer; Roman and Leona Kuchem; Leonard and Isabel Lang; Thomas and Lana Langford; Carl Lensing; Allan Lietzke; Earl Mallinckrodt; James and Evalane Meyer; John Morr; Walter and Edna Nadler; L.W. Niewald; J.M. Potter; Layton Rehmeier; Alan and Mary Richter; Wilbur Rothgeb; Bill Rudloff, Hulda Rueff; Herbert Schmid; Marvin Schupp; Wilbur Schuster; Clara Siegel; Harold and Bonnie Siegel; Mary Sly; Jim and Stephanie Sneed; John and Mary Sneed; Robert Snoddy; Earl Summers, Cleo Tinsley; Terry

Twenter; Price and Edna Vaughan; B.J. Wessing; Charles Wessing; Laura Willenbring; John and Susan Williamson, Jr.; Wilfred and Carol Wissman; Frank Pierson; Clifford Sapp; Brenda Reeder, Alfred Beckmeyer; Clifford Nahler; Robert Sapp; Marvin Sapp; Ina Mae Sapp; Bud Holiman; Amy Easley; Edward and Gloria Belt; Charles and Aurelia Bottenmuller; Bertha Hampton; John Reeder; Sharon Beeler; Thomas Douglass; and Douglass Farms, Inc.; Anthony Aholt, Bernard and Virginia Altheuser; Albert Bates; Helen Bennett; Donald Dothage; Albert Eichhorn; Elda Flatt; Elmer Friedric; Lawerence and Anna Gerke; Norman Gerke; Harold & Geralyn Gloe; David & Tammy Goebel; Donald & Viola Gordon; Elmer Gregory; Harrell Harvey; James Harvey; Alma Horner; William and Elsie Hunt; John and Gladys Miller; May Miller; John and Ethel Nolle; Eugene and Mary Lou Renfrow; James and Dorothy Roddy; Norbert and Louise Schuster; Steve and Debbie Schuster; Lyonel and Irene Schweerkotting; Leonard Struckhoff; Henry, Sr. and Theresa Struckhoff; Clyde and Sarah Twenter; Raymond and Helen Twillman; Earl Wessing; Laura Carpenter; Ryland Kessinger and Ellen Kessinger; Walter Moore and Dorothy Moore; Daniel L. Schlafly; Katherine Walsh and Edward Walsh, Jr.

Defendants and Intervening Defendants (Respondents): Missouri-Kansas-Texas Railroad; Missouri Department of Natural Resources, an agency of the State of MO; Frederick A. Brunner, Director Missouri Department of Natural Resources, Conservation Federation of MO; National Wildlife Federation; the Rails to Trails Conservancy; the Lewis and Clark Nature Trail Foundation; the Sierra Club; the Paralyzed Veterans of America; BICYCLE USA; the Lewis and Clark Heritage Foundation; the American Hiking Society; the Katy MO River Trail Association; the American Rivers Conservation Council; United States

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1989

MAURICE AND DOLORES GLOSEMEYER, et al.,
Petitioners,
vs.
MISSOURI-KANSAS-TEXAS RAILROAD, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

The Petitioners respectfully pray that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The decision of the Court of Appeals (App A) is reported as *Glosemeyer v. Missouri-Kansas-Texas R.R.* (8th Cir 1989) 879 F 2d 316. The decision of the District Court (App B) is reported as *Glosemeyer v. Missouri-Kansas-Texas R.R.* (ED Mo 1988) 685 F Supp 1108.

JURISDICTION

The decision of the Eighth Circuit Court of Appeals was entered on July 5, 1989. The jurisdiction of this Court is invoked under 28 USC §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution:

> ". . . nor [shall any person] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Article I, §8:

> "The Congress shall have power to . . . regulate commerce with foreign nations, and among the several states . . ."

Trails Act Amendment, 16 USC §1247(d):

> "Railroad rights-of-ways. The Secretary of Transportation, the Chairman of the Interstate Commerce Commission, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976, shall encourage State and local agencies and private interests to establish appropriate trails using the provision of such programs. Consistant with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage

energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with the National Trails System Act [16 USC §1241 *et seq.*], if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Commission shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this Act, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use."

Pub. L. 98-11, §101

"Notwithstanding any other provision of this Act, authority to enter into contracts, and to make payments, under this Act shall be effective only to such extent or in such amounts as are provided in advance in appropriation Acts."

STATEMENT OF THE CASE

A
Procedural Summary and Overview

This case began as a quiet title action in the Warren County, Missouri, Circuit Court, to quiet the Property Owners' title to land which had been subject to easements "for the purpose of establishing, constructing and maintaining a railroad on the said land herein conveyed and for no other purpose." (A representative deed [which was before the lower courts] is App D.) The Missouri-Kansas-Texas Railroad had *de facto* abandoned its rail line and thereafter sought and obtained *de jure* approval of that abandonment from the Interstate Commerce Commission (ICC). (*Missouri-Kansas-Texas Railroad Co. — Abandonment — In St. Charles, Warren, Montgomery, Callaway, Boone, Howard, Cooper and Pettis Counties, Mo.* ICC Docket No. AB-102 [Sub-No. 13] [March 6, 1987]) (*M-K-T Abandonment*) (App C)

The quiet title suit was necessitated because the State sought to obtain from the Railroad the right to convert its former railroad right-of-way easement into a recreational trail easement pursuant to 16 USC §1247(d) (the "rails-to-trails" scheme). Such a conversion of use is improper under Missouri law,[1] and cannot Constitution-

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[1] Missouri law has long held that, when an easement is created for a specific use and that use is abandoned, then the easement is extinguished. (*E.g.*, *Missouri-Kansas-Texas Ry. Co. v. Freer* [Mo App 1959] 321 SW 2d 731, 737 [a railroad right-of-way easement is limited to railroad right-of-way use]; *University City v. Chicago, R.I. & P. Ry. Co.* [Mo 1941] 149 SW 2d 321, 326 [abandonment of the use for which the easement was granted ends the easement owner's interest in the property]; *City of Columbia v. Baurichter* [Mo App 1987] 729 SW 2d 475, 481 [when its use is abandoned, "the easement is extinguished"]; *Kansas City Area Transp. Auth. v. 4550*

(continued)

ally be accomplished by a federal statute which forbids compensation to the Property Owners.

The defendants removed the case to the U.S. District Court because their defense involved the application of a federal statute.[2]

The District Court determined that the statutory scheme was Constitutional and that the Property Owners' remedy, if any, was to seek just compensation from the United States in the Claims Court.

On appeal, the Eighth Circuit Court of Appeals affirmed. Expressly acknowledging ". . . that the takings issue has divided the circuit courts of appeal . . ." (App A, p A 15) — with the District of Columbia Circuit holding that the "rails-to-trails" scheme could be a Fifth Amendment taking (*National Wildlife Federation v. ICC* [DC Cir 1988] 850 F 2d 694, 704), and the Second Circuit holding that the "rails-to-trails" scheme could never be a Fifth Amendment taking (*Preseault v. ICC* [2d Cir 1988] 853 F 2d 145, 151; *cert. granted* 57 USLW 3704)[3] — the Eighth Circuit nonetheless concluded that the "rails-to-trails" scheme was Constitu-

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(ftn. continued)
Main Assoc. [Mo App 1986] 742 SW 2d 182, 191 [cessation of use of railroad easement for railroad right-of-way terminates the easement and frees the underlying property owners of the easement's burden].)

[2] The United States and a number of recreational organizations intervened and joined the original State and Railroad defendants. (App A, p A 3)

[3] It is noteworthy that, in *Preseault*, the Solicitor General — on behalf of the ICC — has refused to defend the broad holding of the Second Circuit that the statute ". . . never could effect a taking. We do not defend the judgment on that rationale, which conflicts with the District of Columbia Circuit's opinion . . ." (*Preseault*, Brief for the Federal Respondents 21, fn 13)

tional because compensation could be sought in the Claims Court (App A, p A 19).

Although argued in the briefs, the Court of Appeals' opinion gives no consideration to the explicit statutory prohibition on unauthorized compensation in the Trails Act Amendments, of which the "rails-to-trails" scheme is a part:

> "Notwithstanding any other provision of this Act, *authority to* enter into contracts, and to *make payments*, under this Act shall be effective *only* to such extent or in such amounts as are *provided in advance in appropriation Acts*." (Pub. L. 98-11, §101 [not codified, but reproduced in the notes following 16 USCA §1249]; emphasis added.)

Rather than rule as to this express statutory prohibition on spending Federal money to acquire trails, the Court of Appeals erroneously asserted that "[t]he statute and its legislative history are simply silent." (App A, p A 18) That is factually wrong and distorts the legislative record. The statute and its history are quite vocal in prohibiting any payments which are not approved in advance.[4] That prohibition on payments precludes recovery of compensation in the Claims Court.

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[4] The Court of Appeals similarly misdescribed the import of the statute when it asserted that the Property Owners' argument was that no Claims Court recourse was possible "... because there is no express provision in §1247(d) authorizing a taking or appropriating any funds as compensation." (App A, p A 17) That was not the Property Owners' argument. The argument was that the statute was clear on its face that use of *any* funds for recreational trails which were not specifically authorized in advance was *expressly prohibited*. The Court of Appeals' evasion of the statute's words was necessary to reach its erroneous conclusion.

B
Factual Statement[5]

Land owned by the Property Owners has been subject for a century to easements in favor of the Railroad or its railroad predecessors in interest. Appendix D is representative of the deeds by which these easements were created.

The purpose for which the easements were granted is precise: "for the purpose of establishing, constructing and maintaining a railroad on the said land herein conveyed and for no other purpose," to be used as a "right-of-way for a railroad and for no other purpose."

The 144 Property Owners/Petitioners own individual parts of a strip of land once used by the Railroad for a 200-mile right-of-way crossing two-thirds of Missouri, from Machens (north of St. Louis) westward to Sedalia. The right-of-way ownership disputed in this case was part of the Railroad's main line from St. Louis to Parsons, Kansas. Most of the line is north of, and parallels, the Missouri River.

According to documents filed by the Railroad with the ICC, use had declined, and line operation had become unprofitable. The track and the ties were obsolete, and many of the numerous bridges were in need of substantial repair. The cost to repair, replace, and maintain the tracks, ties, and bridges, made it impossible to profitably operate the line.

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[5] The District Court granted summary judgment in favor of the Respondents and the Court of Appeals affirmed. The facts stated here were not disputed by the Respondents. Both courts assumed the facts to be as stated by the Property Owners. (App A, p A 16)

The proximity of the line to the Missouri River caused continuing problems. The line was subject to flooding and, in fact, was rendered inoperable by floodwaters in October 1986.

Moreover, the need for the line ceased when the Railroad obtained the right to use a parallel right-of-way owned by the Missouri Pacific Railroad south of the Missouri River. The existence of the Missouri Pacific's parallel line on the south side of the Missouri River made the line here in dispute redundant.[6]

Because of the lack of need for the rail line, and the cost to restore it to a useful condition, the ICC authorized abandonment of the line. (App C, p C 10)

C
The "Rails-to-Trails" Scheme

The National Trails System Act (16 USC §1241 *et seq.*) was adopted in 1968 to increase outdoor recreation. Bills were introduced in Congress beginning in 1980, which culminated in the National Trails System Act Amendments of 1983, whose general thrust was to increase the availability of trails at little or no cost to the federal government. (*See generally* Senate Report 98-1; House Report 98-28.) Part of the 1983 program was the so-called "rails-to-trails" scheme.

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[6] Since then, the Missouri-Kansas-Texas Railroad has been acquired by the parent of the Missouri Pacific Railroad, unifying railroad ownership through the Missouri River corridor and nullifying even a theoretical need to re-open the obsolete and redundant line north of the river.

It had come to Congress' attention that there was a "problem" in utilizing some abandoned railroad rights-of-way for recreational trails because the railroads owned only easements of limited life in those rights-of-way which ended when railroad use was abandoned. The "problem" was settled state real property law. The general rule (including the rule in Missouri, as discussed above at p 4, fn 1) was that, on abandonment of use as a right-of-way, the railroad's interest automatically lapsed, restoring title unburdened by the railroad easement to the underlying property owners. (*See generally* Comment, *The Use of Discontinued Railroad Rights-of-Way as Recreational Hiking and Biking Trails: Does the National Trails System Act Sanction Takings?* [1988] 33 St. Louis U.L.J. 205, 211, 213.) Thus, on abandonment of railroad use, railroads which owned only easements were unable to convert their former right-of-way easements into recreational trails even if the railroads so desired.

The solution which Congress devised was 16 USC §1247(d). Congress was ingenuously candid about its intent:

> "The key finding of this amendment is that interim use of a railroad right-of- way for trail use, when the route itself remains intact for future railroad purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes. This finding alone should eliminate many of the problems with this program. The concept of attempting to establish trails only after the formal abandonment of a railroad right-of-way is self-defeating; once a right-of-way is abandoned for railroad

road purposes there may be nothing left for trail use." (House Report 98-28 at 8-9)

The problem with this Congressional solution is that it:

- sought to override and retroactively change state property law;
- ignored settled decisions of this Court that property interests are defined by state, not federal, law;[7] and
- prohibited spending any federal funds for the program except as specifically authorized in advance in Congressional appropriations Acts.

The consequence was confusion. The ICC understood that Congress intended no money to be spent. (*Rail Abandonments — Use of Rights-of-Way as Trails* [1986] 2 ICC 2d 591, 597 [Trails Rules]) The ICC also understood that Congress intended to eliminate the "problem" caused by the legal doctrine that cessation of rail use causes an automatic abandonment of a railroad easement and returns full dominion over the property to the underlying property owners. (Trails Rules, 2 ICC 2d at 597) Thus, when it drafted rules to implement the "rails-to-trails" scheme, the ICC concluded that the scheme would not take property from any private property owners and that, even if it did, no compensation could be awarded for any "delay" in the ability of property owners to recover full use of the land underlying former railroad rights-of-way. (Trails Rules, 2 ICC 2d at 600)

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[7] *Ruckelshaus v. Monsanto Co.* (1984) 467 US 986, 1011; *Webb's Fabulous Pharmacies, Inc. v. Beckwith* (1980) 449 US 155, 161; *Board of Regents v. Roth* (1972) 408 US 564, 577; *PruneYard Shopping Center v. Robins* (1980) 447 US 74, 84.

The Constitutional confusion in this scheme was recently analyzed by the Court of Appeals for the District of Columbia Circuit, which concluded that the "rails-to-trails" scheme *could* result in a taking of property and the ICC *could not* ignore the taking/compensation issue. (*National Wildlife Federation v. ICC* [DC Cir 1988] 850 F 2d 694) *National Wildlife* did not consider whether the statute itself was Constitutional, as the only issue before that court for review was the propriety of the regulations drafted by the ICC.[8]

The question on this appeal is the question presented in *Preseault* and left unaddressed in *National Wildlife*: the Constitutionality of the "rails-to-trails" scheme both on its face and as applied to specific property owners, given their rights and reasonable expectations under settled state easement law and the Fifth Amendment protection afforded them.[9]

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[8] After the DC Circuit told the ICC to reconsider its rules in light of the holding that the impact of the statute and the ICC's rules *could* be a Fifth Amendment taking of property owners' reversionary rights, the ICC ducked the issue, refused to change its rules to consider that possibility, and reiterated its former conclusion. (*Rail Abandonments; Use of Rights-of-Way as Trails; Supplemental Trails Act Procedures* [1989] 54 Fed Reg 8011) (Supplemental Trails Rules) The ICC's evasion of the DC Circuit's remand order is now on appeal (*Beres v. ICC*, DC Cir no. 89-1178), with proceedings in abeyance pending this Court's decision in *Preseault*.

[9] Because of the settled state law described earlier, the Property Owners' rights under Missouri law were assumed by the courts below. As the Court of Appeals put it:

> "Like the district court, we assume for purposes of analysis that the conversion of the right-of-way from railroad use to interim trail use under § 1247(d) constituted a taking of plaintiffs' reversionary interests in the right-of-way. We also assume for purposes of analysis that plaintiffs do possess reversionary interests

(continued)

REASONS FOR GRANTING THE WRIT

THIS COURT HAS ALREADY ACKNOWLEDGED THE IMPORTANCE OF THE ISSUES AT BENCH BY GRANTING CERTIORARI IN *PRESEAULT*

The issues presented in this case are of nationwide importance. This Court's grant of Certiorari in *Preseault* attests to their importance, as does the substantial number of amicus curiae briefs filed in support of both sides in that case. The amici curiae represent organizations and interest groups from all points of the political and economic spectrum and all parts of the nation.

The importance to all of a clear determination of the issues presented in this case cannot be understated. Regardless of one's perception of the propriety of conversion of abandoned railroad rights-of-way to hiking and biking trails, the conflicting decisions of the Second Circuit in *Preseault*, the Eighth Circuit in this case, and the DC Circuit in *National Wildlife* leave the program in a confused limbo which serves no one. Indeed, because of the pending litigation and the conflicting results, the ICC has refused to adopt a position on these issues:

> "Given the fact that the compensation issue is still being actively litigated . . ., we have decided not to take any position on the merits of the different interpretations at this time. Nor will we attempt to

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(ftn. continued)
in the right-of-way which would vest by operation of state law when the right-of-way is no longer used for rail service." App A, p A 16)

> establish perameters for when a compensable taking might occur." (54 Fed Reg at 8013)

The program and the rights of many citizens await this Court's decision.

THERE IS CONFUSION AND CONFLICT AMONG THE CIRCUIT COURTS AND THE ICC ABOUT THE CONSTITUTIONALITY OF CONGRESS' "RAILS-TO-TRAILS" SCHEME

To date, the Courts of Appeals of three Circuits and the ICC have examined challenges to the "rails-to-trails" scheme to determine whether it is Constitutional and, if not, the appropriate remedy:

- the Second Circuit held that the "rails-to-trails" scheme could *never* be a Fifth Amendment taking (*Preseault v. ICC* [2d Cir 1988] 853 F 2d 145, *cert. granted* 57 USLW 3704);
- the DC Circuit held that the "rails-to-trails" scheme *could* be a Fifth Amendment taking (*National Wildlife Federation v. ICC* [DC Cir 1988] 850 F 2d 694);
- the Eighth Circuit, in the case at bench, assumed that the "rails-to-trails" scheme *could* be a Fifth Amendment taking, but held that the remedy for any such taking was a suit in the Claims Court for compensation; and
- the ICC initially concluded that the "rails-to-trails" scheme could *never* be a Fifth Amendment taking (Trails Rules, 2 ICC 2d

> at 600) and then, after the DC Circuit ordered that conclusion reconsidered in *National Wildlife*, reiterated its original conclusion and said that if any property owner felt otherwise, the owner could seek relief from the Claims Court (Supplemental Trails Rules, 54 Fed Reg 8011).

The confusion and conflict among these Circuit Court decisions and ICC rule-makings leave lower courts and all participants in railroad right-of-way abandonment and "trail conversion" proceedings in the dark as to the law. As noted earlier, the ICC has expressly conceded that the current litigational confusion has led it to refrain from taking any position on the issue or formulating any rules to govern it. (Supplemental Trails Rules, 54 Fed Reg at 8013)

This conflict and confusion will continue until this Court acts. In the case at bench, the Eighth Circuit acknowledged the conflict between the Second Circuit and the DC Circuit (App A, pp A 15 - A 16), and attempted to finesse the conflict by bucking the issue to the Claims Court (App A, p A 19).

As the amicus curiae briefs filed in this Court in *Preseault* reveal, other cases raising these Constitutional issues either exist now at early stages or will soon commence. The Nation needs this Court's clarification now — before the conflicts become more extreme and scarce judicial resources are squandered in a search for the Constitutional solution only this Court can provide.

A GOVERNMENTAL PROGRAM WHICH TAKES PRIVATE PROPERTY FOR PUBLIC USE WITHOUT COMPENSATION VIOLATES THE FIFTH AMENDMENT

A taking for public use without compensation violates the Fifth Amendment's Taking Clause:

> ". . . government action that works a taking of property rights *necessarily* implicates the 'constitutional obligation to pay just compensation.' [Citation.]" (*First English Evangelical Lutheran Church v. County of Los Angeles* [1987] 482 US 304, 315; emphasis added.)

If Congress enacts legislation which takes property and intends to provide no compensation, the statute is invalid. (*Hodel v. Irving* [1987] 481 US 704)

The Court of Appeals acknowledged this, but concluded that the potential availability of a suit in the Claims Court to recover compensation for the taking made the statute valid. (App A, p A 19)

Whether the remedy for §1247(d)'s taking of the Property Owners' right to possession of the abandoned easement is compensation through the Claims Court or invalidation of the statute because it takes property without compensation depends on whether Congress intended to preclude compensation. (*Ruckelshaus v. Monsanto Co.* [1984] 467 US 986, 1017) *See also Regional Rail Reorganization Act Cases* (1974) 419 US 102, 126:

> ". . . the true issue is whether there is sufficient proof that Congress intended to *prevent* such recourse [to an action for

> compensation]." (Quoting with approval; emphasis in original.)

Thus, if Congress intended *NOT* to provide compensation, then the validity of any taking by the statute is to be evaluated under the Fifth Amendment as a taking of private property for public use without compensation.

Here, the statute is clear on its face that no money was to be spent on the "rails-to-trails" program *unless* that money was appropriated in advance for that specific purpose:

> "Notwithstanding any other provision of this Act, *authority to* enter into contracts, and to *make payments*, under this Act shall be effective *only* to such extent or in such amounts as are *provided in advance in appropriation Acts*." (Pub. L. 98-11, §101 [not codified, but reproduced in the notes following 16 USCA §1249]; emphasis added.)[10]

Strict Congressional spending limits have been repeatedly enforced by this Court. When Congress has restricted funding, this Court has held that actions in excess of Congressional appropriations are *ultra vires*, not the authorized actions of the government, and thus not cognizable in the Claims Court. (*Hooe v. U.S.* [1910] 218 US 322 [cited with approval on this issue in the *Regional Rail Reorganization Act Cases*, 419 US at 127, fn 16]; *Sutton v. U.S.* [1921] 256 US 575, 579; *Leiter v. U.S.* [1926] 271 US 204; *Southern Cal. Financial Corp. v. U.S.* [Ct Cl 1980] 634 F 2d 521, 524)

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[10] Where Congress expressly precludes property acquisitions or expenditures without its express and advance approval, an attempted acquisition without approval is invalid. (*Maiatico v. U.S.* [DC Cir 1962] 302 F 2d 880)

These settled precedents thus make it clear that, by the spending restriction in this statute, Congress did not authorize any takings which would permit or require recourse to the Claims Court for compensation. Thus, the statute is to be judged as written — without augmentation by the potential of Claims Court compensation. As the statute thereby takes property for public use without compensation, it is invalid. The Eighth Circuit's opinion conflicts with each of the cited cases on this issue by saying that compensation can be available from the Claims Court in spite of the Congressional prohibition on spending.

THE COURT OF APPEALS' ANALYSIS OF A STATUTE WHICH *CONCEDEDLY* TAKES PRIVATE PROPERTY FOR PUBLIC USE VIOLATES THE STANDARD OF REVIEW ESTABLISHED BY THIS COURT IN *NOLLAN v. CALIF. COASTAL COMMN.*

The Court of Appeals' superficial examination of the validity of the "rails-to-trails" scheme under the Commerce Clause (U.S. Const., Art. 1, §8) is doubly flawed:

- first, in its determination of the applicable standard of review, and
- then in its cursory conclusion that the statute was Constitutional.

A. When an Exercise of Governmental Power Abridges Private Property Rights, the Action is Subject to Close Examination

The Court of Appeals erred from the outset when it determined that its function in reviewing the "rails-to-trails" scheme as an exercise of the Commerce power was the narrow one of determining whether there was "any rational basis" for the action. (App A, p A 11)

That standard has *no* application when it is claimed that the governmental action takes private property for public use.

This Court addressed this question in *Nollan v. California Coastal Commn.* (1987) 483 US 825. As the Court there expressed it:

> "We view the Fifth Amendment's property clause to be more than a pleading requirement, and compliance with it to be *more than an exercise in cleverness and imagination.* As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a '*substantial* advanc[ing]' of a legitimate State interest. We are inclined to be *particularly careful* about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is *heightened risk that the purpose is avoidance of the compensation requirement rather than the stated police power objective.*" (483 US at 841; some emphasis added.)

This Court then concluded expressly that:

> "[w]e have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved [citation], not that 'the State "*could rationally have decided*" the measure adopted might achieve the State's objective.' [Citation.]" (483 US at 834, fn 3; emphasis, the Court's.)

As Professor Daniel Mandelker of Washington University Law School expressed it in a new edition of his nationally recognized text:

> "*Nollan's most important holding* is the heightened standard of judicial review it adopted for determining whether a land use regulation substantially advances legitimate governmental interests. This heightened judicial review standard, if the Court meant it to apply to all taking cases, substantially strengthens judicial review of land use regulations under the taking clause." (Mandelker, *Land Use Law* [2d ed 1988] §2.23 at 45; emphasis added.)[11]

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[11] The same analysis appears in Best, *The Supreme Court Becomes Serious About Takings Law: Nollan Sets New Rules For Exactions* (1987) 10 Zon. & Plan. L. Rep. 153, 156; Bosselman & Stroud, *The Current Status of Development Exactions* (1987) 14 Fla. Env. & Urb. Issues 8, 9; Taub, *Exactions, Linkages, and Regulatory Takings: The Developer's Perspective* (1988) 20 The Urban Lawyer 515, 579-580; Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches* (1988) 39 Hast. L.J. 335, 338; Lawrence, *Regulatory Takings: Beyond the Balancing Issues* (1988) 20 The Urban Lawyer 389, 424; Marsh & Rosenthal, *At Long Last, The Supreme Court Speaks Out on the "Taking" Issue* (1987) 5 Cal. Real Prop. J. 1; *The Supreme Court, 1986 Term — Leading Cases* (1987) 101 Harv. L. Rev. 119, 247.

Under longstanding Missouri law, abandonment of the easements by the Railroad *automatically* extinguished the railroad easements, and restored to the Property Owners full, unencumbered use and title. The "rails-to-trails" scheme was designed to change that aspect of state property law. The ICC, the primary interpreter of the statutes governing its operation, conceded the recreational (*i.e.*, non-railroad) purpose of the legislation in describing the Congressional purpose behind the statute:

> "This language demonstrates that the *main purpose of the amendment* is to *remove reversion as an obstacle* that hinders or prevents the successful conversion of entire linear rights-of-way *to recreation use* when the rights-of-way have been operated under easements for railroad purposes. Thus, Congress intends that trail use occur and rights-of-way remain intact when they otherwise would be subject to reversionary interests." (Trails Rules, 2 ICC 2d at 597; emphasis added)

In the case at bench, the Court of Appeals accepted that this statute effects a Fifth Amendment taking:

> ". . . we assume for purposes of analysis that the conversion of the right-of-way from railroad use to interim trail use under § 1247(d) constituted a taking of plaintiffs' reversionary interests. We also assume for purposes of analysis that plaintiffs do possess reversionary interests in the right-of-way which would vest by operation of state law when the right-of-way is no longer used for rail service." (App A, p A 16)

Because of that attempted fundamental change in the private ownership status quo, which requires the Property Owners to relinquish something which they own, the *Nollan* standard of review is required.

Being "particularly careful" in examining the basis of a regulation, as *Nollan* requires, calls for substantially less deference to the governmental rationalizations than in pre-*Nollan* times. Regulations which take property can no longer be sustained in court merely because there is *some* rational basis for believing that the challenged action *might* be necessary or useful.

Nollan's analysis makes this clear. There, the government sought to rely on the minimal, rational basis standard of review used by the Court of Appeals here. (See 483 US at 834.) But this Court would have no part of it. Instead, this Court subjected the government's rationales to careful examination, concluding that one justification for the action was ". . . a made-up purpose of the regulation. . ." (483 US at 839, fn. 6), while others were ". . . impossible to understand . . ." (483 US at 838)

The Court of Appeals' review here is not compatible with the *Nollan* standard of review. Moreover, as the following discussion shows, the "rails-to-trails" scheme is not sustainable even under a "rational basis" standard.

B. The "Rails-to-Trails" Scheme Lacks Sufficient Basis Under the Commerce Clause

The Court of Appeals' analysis of the Commerce Clause issue is due no deference. It reflexively accepts, in a brief discussion and at face value, the vapid rationalizations put forth in support of the "rails-to-trails" scheme. (App A, p A 13) That is not adjudica-

tion; that is abdication. Under any standard of review, more is required than abject acceptance of presumed Congressional rationality. Otherwise, the Constitutional rule would be that there is *never* review of the basis for legislation.

The interstate commerce justification for the statute was said to be the furtherance of the "railbanking" program, *i.e.*, a program to maintain railroad rights-of-way for future use after the present railroad abandons the railroad right-of-way.

However, in the context of the "rails-to-trails" scheme, the "railbanking" rationalization is a sham. The ICC has candidly acknowledged this, concluding that ". . . the *main purpose of the amendment is to remove reversion as an obstacle* that hinders or prevents the successful conversion of entire linear rights-of-way *to recreation use* when the rights-of-way have been operated under easements for railroad purposes." (Trails Rules, 2 ICC 2d at 597; emphasis added)[12]

The operation of the "rails-to-trails" scheme confirms the ICC's conclusion.

Before the ICC can even consider a "rails-to-trails" conversion, it *must* find that the right-of-way is *not* necessary for ". . . present *or future* public convenience or necessity . . ." (49 USC §10903; emphasis added.

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12 The quoted passage then cites, as illustrative of the reason for the enactment of §1247(d), *not* anything having to do with "railbanking" or anything else to do with reviving railroads for that matter, but to state court cases which held that state easement law required extinguishment of railroad easements when railroad use ended. (*Pollnow v. State Dept. of Natural Resources* [Wis 1979] 276 NW 2d 738; *Schnabel v. County of DuPage* [Ill App 1981] 428 NE 2d 671) *That* is the problem addressed by §1247(d), not preservation of rail routes.

See also Exemption of Out of Service Lines [1986] 2 ICC 2d 146, 152.)

As the ICC most recently put it:

> "In *every* Trails Act case, we will *already* have found that the public convenience and necessity permit abandonment (or that regulatory approval is not required under 49 U.S.C. 10505)." (54 Fed Reg at 8012, fn 3; emphasis added.)

In other words, "railbanking" is permitted only *after* the ICC concludes that "railbanking" is not needed, thus confirming that the actual purpose of §1247(d) is the creation of hiking and biking trails, not the preservation of needed rail rights-of-way. The ICC essentially concedes this. (Trails Rules, 2 ICC 2d at 597)

Moreover, the effectuation of this supposed "national interstate commerce" policy was left *not* to the ICC or any national governmental body, but to voluntary agreement[13] between railroads and private trail operators or local government agencies.[14] Absent such agreements, the so-called "national policy" does not function. If the

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[13] The "rails-to-trails" scheme has been repeatedly held to be a voluntary, rather than a mandatory, program. (*Washington State Dept. of Game v. ICC* [9th Cir 1987] 829 F 2d 877; *National Wildlife Federation v. ICC* [DC Cir 1988] 850 F 2d 694; *Connecticut Trust for Historic Preservation v. ICC* [2d Cir 1988] 841 F 2d 479)

[14] The ICC cannot compel trail conversion if no trail group expresses interest (*e.g., Chicago and North Western Transp. Co. — Abandonment and Discontinuance of Trackage Rights* [1988] ICC Docket No. AB-1 [Sub-no. 219][1988 ICC Lexis 365]) *or* if the railroad declines any trail conversion (*e.g., Chicago and North Western Transp. Co. — Abandonment* [1988] ICC Docket No. AB-1 [Sub-No. 215][1989 ICC Lexis 23]; *Missouri Pacific Railroad Co. — Abandonment* [1988] ICC Docket No. AB-3 [Sub-No. 57][1988 ICC Lexis 384]).

trail operator becomes disenchanted with its task, it may abandon the trail at will, with scarcely a "by your leave" to the ICC. (49 CFR §1152.29[C][2]) Whether there is any "railbanking" at all is thus left to the whim of trail operators and railroads. This is a recreation measure, not a railroad measure. When Congress addresses national railroad policy, it is much more direct.

No finding that a particular right-of-way is even suitable (let alone needed) for "railbanking" is necessary before the ICC authorizes conversion to recreational trail use. (49 CFR §1152.29)[15] This caused the D.C. Circuit evident concern. (*See National Wildlife*, 850 F 2d at 707, 708.)

Here, the Court of Appeals refused to consider the *actual* rationality of this scheme, opting for an *assumed* rationality. *Nollan* makes that mode of review inappropriate.

The "rails-to-trails" scheme is a transparent attempt to alchemize private property into public hiking and biking trails at no cost to the public, but at substantial loss to individual property owners. The "rails-to-trails" scheme is not justifiable as railroad regulation under the Commerce Clause.[16] It is recreational legislation, and nothing more.

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[15] This is highly pertinent in a case such as this one where the right-of-way was abandoned in favor of a superior, parallel right-of-way across the Missouri River and not as susceptible to the River's ravages as the abandoned right-of-way. Had this inquiry been made, it would have disclosed no potential for future reactivation of this inferior abandoned right-of-way.

[16] The analysis in this section also demonstrates that the "rails-to-trails" scheme is a denial of substantive due process as applied to the Property Owners, as it is arbitrary, capricious, and lacking in a rational basis. (*See Littlefield v. City of Afton* [8th Cir 1986] 785 F 2d 596.)

CONCLUSION

This Court's grant of Certiorari in *Preseault* recognizes that the issues presented in this case are important and require resolution. Those issues touch the core of the relationship between the government and the governed. They deal with the Constitutional limitations on the government's ability to retroactively redefine private property interests to serve some perceived public need.

No one questions the power of Congress to act in the public interest. But the issue here, as is so often the case in Constitutional litigation, is means, not ends. As this Court put it in *First English*:

> ". . . many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities and the Just Compensation Clause of the Fifth Amendment is one of them." (482 US at 321)

Here, in its effort to expand recreational opportunities for some, Congress has violated the rights of others. It has enacted legislation which takes property from private owners and declares it to be the public's. And, in so doing, Congress made it clear that *no* federal funds were to be spent on the program unless Congress specifically authorized the expenditure in advance.

That clear prohibition on spending money precludes any recourse these Property Owners might otherwise have to seek compensation in the Claims Court. The Court of Appeals' conclusion that the Claims Court is available for compensation could only be reached by ignoring the Congressional prohibition on spending money.

Because the statute thus takes private property for public use (as the Court of Appeals acknowledged [App A, p A 16]), and provides no compensation, the statute is void (*Hodel v. Irving* [1987] 481 US 704).

The issues here are important. The Property Owners pray that Certiorari be granted or that the decision whether to grant Certiorari be deferred until after this Court decides *Preseault.* If the decision as to Certiorari is deferred, this Court can ensure that the Property Owners at bench receive treatment consistent with *Preseault.* Deferral would also provide this Court with a ready vehicle to address these issues if, for some reason, *Preseault* is found to be procedurally inappropriate.

Respectfully submitted,

FADEM, BERGER & NORTON

MICHAEL M. BERGER
Counsel of Record

Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
NO. 88-1863

Maurice and Dolores Glosemeyer; Fred and Alwera Brodbeck; Richard and Esther Burgess; John and Marjorie Dohr; Clarence and Onita Duenke; Ada Haase; Roy and Phyllis Haase; Wayne and Maureen Heck; Bernard Hellebusch; Elmer and Regina Hellebusch; James and Patricia Hellebusch; Mrs. Bernard Moellering; Alvin Roewe; Werner Roewe; James and Carla Schwoeppe; Donald and Delores Vitt; Jay and Nancy Walk, Jr.; Clarence Bergman; Harold Blaylock; Maurine Bluhm; Clara Boessen; Ralph and Mildred Brandt; Anne Buckley; Roy Cary; Kenneth and Loretta Burre; Walter and Helen Burre; Albert and Esther Dickson; Charles Dilthey; Denis Engemann; Gerald Engemann; Bernard and Geraldine Eichelberger, Sr.; Glen and Eleta Eichhorn; Sidney and Nadine Eldringhoff; Irven and Margaret Ewing; Hattie Farris; Bruce Florea; Andrew and Emilie Gerke; Anton and Alice Gerke; Herbert Gerke; Roy and Helen Gramlich; Clifford and Rosaline Haid; Norma and Edward Hasselman; Erwin and Alberta Heck; Linda and Gordon Heck; Marie and Leroy Heidbreder; Earl and Gladys Heitmann; Gary and Patty Heldt; Randy and Kendall Kircher; Leroy Kircher, Jr.; John and Barbara Knaus; Randall Kollmeyer; Roman and Leona Kuchem; Leonard and Isabel Lang; Thomas and Lana Langford; Carl Lensing; Allan Lietzke; Earl Mallinckrodt; James and Evalane Meyer; John Morr; Walter and Edna Nadler; L.W. Niewald; J.M. Potter; Layton Rehmeier; Alan and Mary Richter; Wilbur Rothgeb; Bill Rudloff, Hulda Rueff; Herbert Schmid; Marvin Schupp; Wilbur Schuster; Clara Siegel; Harold and Bonnie Siegel; Mary Sly; Jim and Stephanie Sneed; John and Mary Sneed; Robert Snoddy; Earl Summers, Cleo Tinsley; Terry Twenter; Price and Edna Vaughan; B.J. Wessing; Charles Wessing; Laura Willenbring; John and Susan Williamson, Jr.; Wilfred and Carol Wissman; Frank Pierson; Clifford Sapp; Brenda

Reeder, Alfred Beckmeyer; Clifford Nahler; Robert Sapp; Marvin Sapp; Ina Mae Sapp; Bud Holiman; Amy Easley; Edward and Gloria Belt; Charles and Aurelia Bottenmuller; Bertha Hampton; John Reeder; Sharon Beeler; Thomas Douglass; and Douglass Farms, Inc.; Anthony Aholt, Bernard and Virginia Altheuser; Albert Bates; Helen Bennett; Donald Dothage; Albert Eichhorn; Elda Flatt; Elmer Friedric; Lawerence and Anna Gerke; Norman Gerke; Harold & Geralyn Gloe; David & Tammy Goebel; Donald & Viola Gordon; Elmer Gregory; Harrell Harvey; James Harvey; Alma Horner; William and Elsie Hunt; John and Gladys Miller; May Miller; John and Ethel Nolle; Eugene and Mary Lou Renfrow; James and Dorothy Roddy; Norbert and Louise Schuster; Steve and Debbie Schuster; Lyonel and Irene Schweerkotting; Leonard Struckhoff; Henry, Sr. and Theresa Struckhoff; Clyde and Sarah Twenter; Raymond and Helen Twillman; Earl Wessing; Laura Carpenter; Ryland Kessinger and Ellen Kessinger; Walter Moore and Dorothy Moore; Daniel L. Schlafly; Katherine Walsh and Edward Walsh, Jr.,

Appellants,

v.

Missouri-Kansas-Texas Railroad; Missouri Department of Natural Resources, an agency of the State of MO; Frederick A. Brunner, Director Missouri Department of Natural Resources,

Appellees.

Conservation Federation of MO; National Wildlife Federation; the Rails to Trails Conservancy; the Lewis and Clark Nature Trail Foundation; the Sierra Club; the Paralyzed Veterans of America; BICYCLE USA; the Lewis and Clark Heritage Foundation; the American Hiking Society; the Katy MO River Trail Association; the American Rivers Conservation Council; United States,

Intervenors Below.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: December 12, 1988
Filed: July 5, 1989

Before McMILLAN and BEAM, Circuit Judges, and WHIPPLE,* District Judge.

McMILLIAN, Circuit Judge.

Plaintiffs appeal from a final order entered in the District Court[1] for the Eastern District of Missouri rejecting their constitutional challenge to § 8(d) of the National Trails System Act of 1968 (Trails Act), as amended, 16 U.S.C. § 1247(d) (hereinafter § 1247(d)), and granting summary judgment in favor of defendants. *Glosemeyer v. Missouri-Kansas-Texas R.R.*, 685 F. Supp. 1108 (E.D. Mo. 1988) (*Glosemeyer*). Plaintiffs are 144 individuals who own property adjacent to a railroad line in eastern Missouri that is no longer in use.[2] Their properties are subject to easements or rights-of-way for railroad use. The Missouri-Kansas-Texas Railroad Co. (MKT), the Missouri Department of Natural Resources (DNR), and the director of the DNR, Frederick A. Brunner, were the original defendants. The United States and eleven environmental and recreational interest groups[3]

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* The Honorable Dean Whipple, United States District Judge for the Western District of Missouri, sitting by designation.

1 The Honorable George F. Gunn, Jr., United States District Judge for the Eastern District of Missouri.

2 The district court granted the American Farm Bureau Federation and the Missouri Farm Bureau Federation leave to file briefs in support of plaintiffs as amici curiae. These organizations filed a joint amicus brief in support of plaintiffs on appeal.

3 The interest group intervenors are the Conservation Federation of Missouri, the National Wildlife Federation, the Rails to Trails Conservancy, the Lewis and Clark Nature Trial [*sic*] Foundation, the Sierra Club, the Paralyzed Veterans of America, BICYCLE USA, the Lewis and Clark Heritage Foundation, the American Hiking Society,

(continued)

were later granted leave to intervene as defendants.

For reversal plaintiffs argue the district court erred in granting summary judgment in favor of defendants because § 1247(d) (1) constitutes a taking of rights-of-way for trail use without just compensation in violation of the takings clause of the fifth amendment, (2) is not a valid exercise of power under the commerce clause, and (3) impairs private contractual rights in violation of the contracts clause and the due process clause of the fifth amendment. For the reasons discussed below, we affirm the order of the district court.

STATUTORY BACKGROUND

The following is a summary for purposes of analysis only. For a comprehensive legislative history of the Trails Act and the 1983 amendments, see the discussions in *Glosemeyer*, 685 F. Supp. at 1113-17, and *National Wildlife Federation v. ICC*, 271 U.S. App. D.C. 1, 850 F.2d 694, 697-99 (1988) (*NWF*). Section 1247(d) is part of the Trails Act. Congress enacted the Trails Act in 1968 in order to establish a nation-wide system of nature trails. As originally enacted, the Trails Act made no provision for the conversion of railroad rights-of-way to trail use. *NWF*, 850 F.2d at 697. By the early 1970s, however,

> [c]oncerned about the disintegration of our national rail system due, in part, to abandonment of rail corridors, [C]ongress called for a study on establishing a "rail bank" consisting of selected abandoned railroad rights-of-way. Railroad Revitalization and Regulatory Reform Act of 1976 [(4-R Act)], § 809, Pub. L. No. 94-210, Title VIII, 90 Stat. 144 (codified as amended at 49 U.S.C.

(ftn. continued)
the KATY Missouri River Trail Association, and the American Rivers Conservation Council.

> § 10906 (1980)). One significant impediment to the preservation of rail corridors has been that much railroad right-of-way is held by easement only and, under the laws of some states, once rail service is discontinued such easements automatically expire and the rights-of-way revert to adjacent property owners.
>
> To address this problem, [C]ongress enacted 16 U.S.C. § 1247(d) as part of the 1983 Trails Act Amendments in order (1) to preserve for possible future railroad use rights-of-way that are not currently in service and (2) to allow interim use of the rail corridors as recreational trails.

Preseault v. ICC, 853 F.2d 145, 147 (2d Cir. 1988) (*Preseault*), *cert. granted*, 109 S. Ct. 1929 (1989).

As explained in *Glosemeyer*, 685 F. Supp. at 1116-17 (citations omitted), § 1247(d)

> grant[s] interested parties the opportunity to use, for recreational purposes, and to preserve, for future rail service, railroad rights-of-way which have been approved for abandonment. Section 1247(d) provides that if interim trail use "is subject to restoration or reconstruction for railroad purposes" then such use "shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." It also provides that if a qualified public or private entity is prepared to assume full responsibility for the management of the right-of-way and for any liability arising out of its transfer or use, the [Interstate Commerce Commission (ICC)] "shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with [the Trails

Act], and shall not permit abandonment or discontinuance inconsistent or disruptive of such use."

. . . .

Under its final rules,[4] when the ICC finds that a railroad right-of-way is appropriate for abandonment under 49 U.S.C. § 10903 and when a qualified public or private entity offers to maintain the right-of-way for interim trail use, the ICC issues a [Certificate of Interim Trail Use (CITU)]. The CITU permits the railroad to discontinue rail service, cancel tariffs and salvage track and other equipment. It further provides the railroad and the prospective interim trail user 180 days to negotiate an interim trail use agreement. If no agreement is reached, "then the CITU will convert into an effective certificate of abandonment, permitting the railroad to abandon the line immediately." If, however, an agreement is reached, the ICC will permit interim trail use and hold in abeyance its authorization to abandon the right-of-way. Should the trail user thereafter seek to terminate its use of the right-of-way, it must file a "petition to reopen the abandonment proceeding" so that the ICC may

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[4] *See Rail Abandonments — Use of Rights-of-Way as Trails*, 2 I.C.C.2d 591 (1986), *and Rail Abandonments — Supplemental Trails Act Procedures*, 4 I.C.C.2d 152 (1987) (codified at 49 C.F.R. § 1152.29). In response to other litigation involving railbanking, *see National Wildlife Fed'n v. ICC*, 271 U.S. App. D.C. 1, 850 F.2d 694 (1988), the ICC recently issued a supplemental policy statement expressing its conclusion that the railbanking provision does not violate the just compensation clause, either because railbanking does not constitute a taking or because, if it does constitute a taking, monetary relief is available under the Tucker Act in the Claims Court. *See* 54 Fed. Reg. 8011, 8013 (Feb. 24, 1989). A petition for review has been filed. *Beres v. ICC*, No. 89-1178 (D.C. Cir. Mar. 14, 1989).

> "issue a certificate of abandonment to the railroad and to the trail user."
>
> . . . Accordingly, "[t]he key finding of [§ 1247(d)] is that interim use of a railroad right-of-way for trail use, when the route itself remains intact for future railroad purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes."

See also NWF, 850 F.2d at 669-02 (interim trail use requires voluntary agreement between railroad and trail user); *Washington State Department of Game v. ICC*, 829 F.2d 877, 879-81 (9th Cir. 1987) (same).

PROCEDURAL BACKGROUND

At issue in the present case is approximately 200 miles of railroad right-of-way between Machens and Sedalia, Missouri; much of the railroad line follows the north bank of the Missouri River. MKT no longer provides rail service over the railroad line.

In September 1986 MKT filed an application with the ICC pursuant to 49 U.S.C. § 10903 to abandon the contested section of right-of-way. Several parties protested or commented on the MKT application to abandon, including the DNR. In October 1986 the DNR invoked § 1247(d) and requested the ICC to issue a CITU to preserve the right-of-way for rail-banking, citing the geological, biological, historical, archeological, and cultural values of the right-of-way. MKT was interested in working out an interim use agreement with the state and the other interest groups. Adjacent landowners, however, opposed the conversion of the right-of-way to trail use on the grounds that, by operation of state law, once the right-of-way is no longer used for rail purposes, it automatically dissolves. They also expressed concerns about security and crime.

In March 1987 the ICC concluded that the economic burden on MKT of continued operation outweighed the inconvenience to shippers and others from discontinuance of service and authorized issuance of a CITU pursuant to § 1247(d) in lieu of a certificate of abandonment. *Missouri-Kansas-Texas R.R. — Abandonment — St. Charles, Warren, Montgomery, Calloway, Boone, Howard, Cooper & Pettis County, Mo.*, ICC No. AB-102 (Sub-No. 13) (served Mar. 16, 1987). On April 22, 1987, the ICC issued the CITU. *Id.* (served Apr. 27, 1987).

In the meantime, in December 1986, after the ICC final rules had been issued but before the ICC issued the CITU, plaintiffs, owners of property adjacent to the right-of-way, filed an action to quiet title in state court against MKT, the DNR, and Brunner, the director of the DNR. The action was later removed to federal district court. Plaintiffs alleged that their predecessors-in-interest had granted a right-of-way over their property to the predecessors-in-interest of MKT "for the purpose of right-of-way for a Railroad, and for no other purpose." Plaintiffs argued that when MKT ceased to use the right-of-way for the purpose of a railroad, MKT, by operation of state law, lost its interest in the right-of-way and had no interest in the right-of-way to transfer to DNR. Plaintiffs alleged that but for conversion of the right-of-way from "rails to trails" use under § 1247(d), their reversionary interests in the right-of-way would have vested in them under state law. Plaintiffs argued § 1247(d) violated the commerce clause, the contracts clause, the due process clause, the takings clause, and various state constitutional and statutory provisions. Plaintiffs sought declaratory and injunctive relief.

As noted earlier, the United States and eleven environmental and recreational interest groups intervened.

In a well-reasoned opinion, the district court held that it had subject matter jurisdiction over plaintiffs' constitutional challenge to § 1247(d), *Glosemeyer*, 685 F. Supp. at 1112,

but not plaintiffs' claims against the regulations and the ICC decision, *id.*, and rejected plaintiffs' claims on the merits, holding that § 1247(d) did not violate the commerce clause, the contracts clause, the fifth amendment due process clause, or the takings clause, and that state law in conflict with the federal statutory scheme was pre-empted. *Id.* at 1118-22. The district court granted summary judgment in favor of defendants and against plaintiffs and declared § 1247(d) is constitutional. This appeal followed.

JURISDICTION

As a preliminary matter, we hold that we have appellate jurisdiction under 28 U.S.C. § 1291 and do not reach the question whether we also have jurisdiction under 28 U.S.C. § 2342. *Cf. Preseault*, 853 F.2d at 149 (finding appellate jurisdiction pursuant to 28 U.S.C. § 2342 to review constitutional challenge to ICC order under § 1247(d); describing as nonsensical requirement of bifurcated challenge). Plaintiffs' action to quiet title in state court was removed to federal district court in December 1986; the ICC decision granting the CITU was not served until March 6, 1987. Because no administrative action had been taken at the time plaintiffs' complaint had been removed and filed in federal district court, the district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1337, to decide plaintiffs' facial challenge to the constitutionality of § 1247(d). *See Preseault*, 853 F.2d at 149, *citing Public Utilities Comm'n v. United States*, 355 U.S. 534, 540 (1958).

We also agree that the district court did not have subject matter jurisdiction over plaintiffs' challenge to the ICC's decision to grant the CITU and to the ICC's final rules implementing § 1247(d). Under 28 U.S.C. § 2342, the federal circuit courts of appeal, and not the federal district courts, have exclusive jurisdiction to "determine the validity of . . . all rules, regulations, or final orders of the [ICC]

made reviewable by [28 U.S.C. § 2321]." *See NWF*, 850 F.2d at 699 (petitions for review of final ICC rules); *Washington State Department of Game v. ICC*, 829 F.2d at 878 (petitions for review of ICC decision to deny CITU and final ICC rules).

CONTRACTS CLAUSE

We first address plaintiffs' contracts clause and related substantive due process arguments. Plaintiffs argue that § 1247(d) violates the contracts clause, U.S. Const. art. I, § 10. Brief for Appellants at 48 n.31. Plaintiffs characterize the grants of right-of-way by their predecessors-in-interest to MKT's predecessors-in-interest as contracts and argue that § 1247(d) impairs their rights under these contracts by purporting to transfer their reversionary interests in the right-of-way to a third-party, that is, the designated interim trail user or, possibly, the public. As correctly noted by the district court, this argument must fail because the contracts clause[5] applies only to state, not federal, laws. *Glosemeyer*, 685 F. Supp. at 1118; *see also NWF*, 850 F.2d at 702 n.12. Section 1247(d) is federal legislation.

"Any claim that federal legislation unlawfully impairs existing contracts falls under the due process clause of the fifth amendment." *NWF*, 850 F.2d at 702 n.12. "The party asserting a Fifth Amendment due process violation must overcome a presumption of constitutionality and 'establish that the legislature acted in an arbitrary and irrational way.' " *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe R.R.*, 470 U.S. 451, 472 (1985), *citing Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). Plaintiffs argue that § 1247(d) violates substantive

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[5] The contracts clause provides in part that "[n]o State shall . . . pass any . . . law impairing the Obligation of Contracts."

due process because it is arbitrary, capricious and lacking in a rational basis. Brief for Appellants at 48 n.31.

Even if we assume for purposes of analysis, as did the district court, that the right-of-way agreements were contracts and that § 1247(d) substantially impaired plaintiffs' contractual rights, this argument must fail. The substantive due process argument is related to plaintiffs' commerce clause argument. As discussed further below, we reject both arguments for the same reasons. We agree with the district court that "Congress acted rationally in enacting § 1247(d) by electing to postpone railroad abandonments and to encourage interim trail use so as to further its railbanking purpose." *Glosemeyer*, 685 F. Supp. at 1119.

COMMERCE CLAUSE

The district court concluded that "Congress acted rationally in enacting § 1247(d) by electing to postpone railroad abandonments and to encourage interim trail use so as to further its railbanking purpose" and thus held § 1247(d) did not violate the commerce clause. *Glosemeyer*, 685 F. Supp. at 1117-18. As a threshold matter, plaintiffs argue the district court erred in applying a rational basis test. Plaintiffs argue the applicable standard of review is strict scrutiny, *citing Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (*Nollan*). *Nollan* involved land use regulation. We think the district court correctly characterized § 1247(d) as part of the comprehensive federal scheme regulating railroads and thus subject to commerce clause analysis and the rational basis test. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (*Hodel*).

On the merits, plaintiffs argue that § 1247(d) lacks a rational basis because Congress's express legislative purpose, railbanking, is a sham. Plaintiffs argue that railbanking is merely a subterfuge for Congress's "real" purpose, that is, the conversion, without just compensation, of their rever-

sionary interests in the right-of-way to recreational trail use. As is apparent from the reference to just compensation, this argument is related to plaintiffs' takings clause argument discussed below. Plaintiffs argue that it is virtually impossible to believe that railroad lines which have been proposed for abandonment and converted to interim trail use will ever be restored to rail service in the future. Plaintiffs argue that, because in most cases the track will have been salvaged, resumption of rail service would require the installation of a new roadbed and new track and the repair or reconstruction of bridges and would thus be prohibitively expensive. Plaintiffs argue that in the present case resumption of rail service is particularly unlikely in light of MKT's acquisition of trackage rights along a route parallel to this right-of-way.

Plaintiffs also argue that, assuming there is a rational basis for railbanking, the means chosen by Congress are not reasonably related to this purpose. For example, plaintiffs argue that certification for interim trail use affects only 5% of all railroad rights-of-way proposed for abandonment and thus is a remarkably underinclusive way to preserve rights-of-way for future rail service. Plaintiffs also argue that, although railbanking is ostensibly of vital importance to the national welfare, certification for interim trail use is not mandatory and instead depends upon the voluntary cooperation of both the abandoning railroad and the prospective interim trail user.

Under commerce clause analysis, the scope of judicial review is "relatively narrow." *Hodel*, 452 U.S. at 276.

> In determining whether an exercise of congressional power is valid under the commerce clause a court may consider only (1) whether there is any rational basis for a congressional finding that the regulated activity affects interstate commerce; and (2) whether "the means chosen by [Congress are] reasonably adapted to the end permitted by the Constitution."

Preseault, 853 F.2d at 149, *citing Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262 (1964); *see also Hodel*, 452 U.S. at 276.

We hold the district court's analysis on the merits is correct. First, we agree that railbanking is not a mere sham for recreation or conservation uses. "[Section 1247(d)] serves two purposes: (1) preserving rail corridors for future railroad use and (2) permitting public recreational use of trails. Both purposes are legitimate congressional goals under the commerce clause." *Preseault*, 853 F.2d at 150. Because plaintiffs do not contend that § 1247(d) is a regulation of an activity which does not affect interstate commerce or that Congress cannot regulate railroad abandonments,[6] the only issue is whether § 1247(d) was reasonably adapted to these two purposes. We agree with the Second Circuit that interim trail use is "a remarkably efficient and sensible way to achieve both goals." *Id.*

> Section 1247(d) enables railroads that wish to discontinue service to help preserve rights-of-way for future rail use, when they might otherwise seek to abandon a line; it protects the railroad from liability in the interim; and it provides for maintenance of the right-of-way by the trail user during the interim.

Id. It may well be true that interim trail use is not a very effective way to accomplish these goals. However, such an argument should be addressed to Congress, not the courts.

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[6] "Congress's authority to regulate the railroads is well recognized, as is its authority to regulate railroad abandonments." *Preseault v. ICC*, 853 F.2d 145, 150 (2d Cir. 1988) (citations omitted), *cert. granted*, 109 S. Ct. 1929 (1989). And, as noted by the district court, "Congress vested in the ICC 'exclusive' and 'plenary' authority over railroad abandonments." *Glosemeyer v. Missouri-Kan.-Tex. R.R.*, 685 F. Supp. 1108, 1113 (E.D. Mo. 1988), *citing Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 321 (1981).

"[T]he effectiveness of existing laws in dealing with a problem identified by Congress is ordinarily a matter committed to legislative judgment." *Hodel*, 452 U.S. at 283.

TAKINGS CLAUSE

This is plaintiffs' principal argument. The district court held that § 1247(d) did not constitute an unconstitutional taking of plaintiffs' property without just compensation because plaintiffs had an adequate legal remedy under the Tucker Act, 28 U.S.C. § 1491.[7] *Glosemeyer*, 685 F. Supp. at 1119. Plaintiffs argue that § 1247(d) effects a temporary regulatory taking of their reversionary interests in the right-of-way by postponing the vesting of these interests under state law. Plaintiffs argue that this constitutes a taking without just compensation in violation of the takings clause. Plaintiffs further argue that they have no adequate remedy at law and are therefore entitled to equitable relief, that is, enjoyment of their property free of the right-of-way or easement for railroad use. They argue the Tucker Act remedy is not available because § 1247(d) does not include any provision for compensation and because Congress did not appropriate any funds to acquire lands for the national trails system.

MKT, the state defendants, and the environmental and recreational interest group defendants argue jointly that

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[7] The Tucker Act, 28 U.S.C. § 1491(a)(1), provides in part that

> [t]he United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

§ 1247(d) does not effect a taking at all. These defendants note that, under § 1247(d), when the ICC authorizes interim trail use instead of abandonment, the right-of-way has not been abandoned and remains subject to the exclusive and continuing jurisdiction of the ICC. They argue that state property law is irrelevant unless and until the ICC declares the right-of-way to be abandoned, thereby ending its jurisdiction over the right-of-way. The United States argues that, even if § 1247(d) does effect a taking, the district court correctly held that equitable relief was not available because plaintiffs could seek just compensation under the Tucker Act in the Claims Court. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (*Monsanto*) (alleged regulatory taking of trade secrets per pesticide statute; no equitable relief because compensation available per Tucker Act).

In the present case the district court did not decide whether the conversion of the right-of-way from rail use to interim trail use under § 1247(d) constituted a taking. Instead, the district court assumed for purposes of analysis that conversion of the right-of-way from rail use to interim trail use would effect at least a temporary taking of plaintiffs' reversionary interests in the right-of-way. The district court concluded, however, that § 1247(d) did not constitute a violation of the takings clause because plaintiffs had an available legal remedy — they could sue for damages under the Tucker Act in claims court. *Glosemeyer*, 685 F. Supp. at 1119-20. For the reasons discussed below, we hold the district court's analysis of the takings issue was correct.

We note that the takings issue has divided the circuit courts of appeal. The District of Columbia Circuit has strongly suggested that "the postponement of a reversionary interest that would otherwise vest under state law constitutes a taking of private property [for public use] for which just compensation must be made." *NWF*, 850 F.2d at 704 (reviewing ICC final rules which provided that conversion of rights-of-way from railroad use to interim trail use would not

result in a taking of any reversionary interests in rights-of-way; rules remanded to ICC for further consideration); *accord Lawson v. State*, 107 Wash. 2d 444, 730 P.2d 1308, 1315-16 (1986); *cf. Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974) (*Regional Rail*) ("erosion taking" under the Regional Rail Reorganization Act of 1973). The Second Circuit, however, has squarely held that § 1247(d) does not effect a taking because "[t]he ICC has plenary and exclusive authority to determine whether it is appropriate under all the circumstances to allow a railroad carrier to abandon a route, and if the ICC determines that abandonment is not appropriate, no reversionary interest [in the right-of-way] can or would vest [under state law]." *Preseault v. ICC*, 853 F.2d at 151; *accord State ex rel. Washington Wildlife Preservation, Inc. v. State*, 329 N.W.2d 543 (Minn.), *cert. denied*, 463 U.S. 1209 (1983). The Supreme Court recently granted a petition for writ of certiorari in the *Preseault* case. 109 S. Ct. 1929 (1989).

Like the district court, we assume for purposes of analysis that the conversion of the right-of-way from railroad use to interim trail use under § 1247(d) constituted a taking of plaintiffs' reversionary interests in the right-of-way.[8] We also assume for purposes of analysis that plaintiffs do possess reversionary interests in the right-of-way which would vest by operation of state law when the right-of-way is no longer used for rail service. *But cf. NWF*, 850 F.2d at 703-04 (state laws operate subject to plenary authority of ICC to regulate railroad abandonments and cannot transfer, extinguish or cause reverter of right-of-way prior to ICC-approved abandonment).

In our view, whether § 1247(d) effects a taking of plaintiffs' property interests does not answer plaintiffs' constitu-

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[8] "The inquiry into whether a taking has occurred is essentially an 'ad hoc, factual inquiry.' " *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (citation omitted).

tional challenge; rather, what is dispositive is whether plaintiffs can obtain compensation, which depends, in turn, upon whether plaintiffs can sue under the Tucker Act, 28 U.S.C. § 1491. This is because the takings clause[9] of the fifth amendment "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987) (citations omitted).

> [It is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the "constitutional obligation to pay just compensation."

Id. at 315 (emphasis in original), *citing Armstrong v. United States*, 364 U.S. 40, 49 (1960). "The Fifth Amendment does not require that compensation precede the taking." *Monsanto*, 467 U.S. at 1016 (citation omitted). "All that it requires is that a ' "reasonable, certain and adequate provision for obtaining compensation" ' exist at the time of the taking." *Glosemeyer*, 685 F. Supp. at 1119, *citing Regional Rail*, 419 U.S. at 124-25. "Generally, an individual claiming that the United States has taken his [or her] property can seek just compensation under the Tucker Act, 28 U.S.C. § 1491." *Monsanto*, 467 U.S. at 1016 (footnote omitted).

Plaintiffs, of course, argue that they cannot sue under the Tucker Act because there is no express provision in § 1247(d) authorizing a taking or appropriating any funds as compensation. Plaintiffs further argue that because the Tucker Act is not available to them, they have no adequate legal remedy and are thus entitled to equitable relief. We disagree.

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[9] The takings clause provides in part that "private property [shall not] be taken for public use, without just compensation."

> In determining whether a Tucker Act remedy is available for claims arising out of a taking pursuant to a federal statute, the proper inquiry is not whether the statute "expresses an affirmative showing of congressional intent to permit recourse to a Tucker Act remedy," but "whether Congress has in the [statute] *withdrawn* the Tucker Act grant of jurisdiction to the Court of Claims to hear a suit involving the [statute] 'founded . . . upon the Constitution.' "

Id. at 1017, *citing Regional Rail*, 419 U.S. at 126 (emphasis in original). As noted by the district court, "[a]ltogether absent in § 1247(d) or its legislative history is a discussion of the interaction between § 1247(d) and the Tucker Act." *Glosemeyer*, 685 F. Supp. at 1120.

> Congress did not address the liability of the United States to pay just compensation if a taking be found to have occurred. Congress either did not believe that the postponement of a railroad's abandonment of a right-of-way constituted a taking or assumed that the general grant of jurisdiction under the Tucker Act would provide a necessary remedy for any taking that might be found to have occurred. In either event, Congress' failure to address the issue cannot be construed to reflect an unambiguous intention to withdraw the Tucker Act remedy.

Id. at 1121. The statute and its legislative history are simply silent.

In the face of this legislative silence, the district court correctly refused to hold that the Tucker Act remedy was not available to plaintiffs. The most that can be said is that § 1247(d) is ambiguous on the question of the availability of the Tucker Act remedy. Because "the Tucker Act grants what is now the Claims Court 'jurisdiction to render judgment upon any claim against the United States founded . . .

upon the Constitution, ' " *id.* (citations omitted), holding that plaintiffs could not sue under the Tucker Act with respect to takings under § 1247(d) would amount to holding that § 1247(d) withdrew jurisdiction from the Claims Court and thus partially repealed the Tucker Act. Not only are "repeals by implication . . . disfavored," *Regional Rail*, 419 U.S. at 133, it is also entirely possible for § 1247(d) and the Tucker Act to co-exist. "[W]here two statutes are 'capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.' " *Monsanto*, 467 U.S. at 1018, *citing Morton v. Mancari*, 417 U.S. 535, 551 (1974) (intermediate citation omitted). In the absence of a clearly expressed Congressional intention to the contrary, the district court correctly refused to construe § 1247(d) to withdraw the Tucker Act remedy. We hold that § 1247(d) does not violate the takings clause.

Finally, we hold that the district court correctly denied plaintiffs' request for equitable relief. "Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." *Monsanto*, 467 U.S. at 1016 (footnote omitted).

Accordingly, we affirm the order of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

685 FEDERAL SUPPLEMENT 1108

Maurice and Dolores GLOSEMEYER, et al.,
Plaintiffs,
v.
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, et al.,
Defendants.

No. 86-2508C(6).
United States District Court, E.D. Missouri.
May 10, 1988.

MEMORANDUM

GUNN, District Judge.

This action involves a challenge to Section 8(d) of the National Trails System Act, as amended, 16 U.S.C. § 1247(d) ("§ 1247(d)"). Section 1247(d), enacted in furtherance of a national policy to preserve established railroad rights-of-way for future reactivation of rail service, authorizes the Interstate Commerce Commission ("ICC") to enter orders permitting such rights-of-way to be used on an interim basis as recreational trails. Plaintiffs, adjacent landowners to a railroad right-of-way subject to an ICC order entered pursuant to § 1247(d), challenge the section on various federal and state constitutional and statutory grounds.

In 1983 Congress amended Section 8 of the National Trails System Act of 1968 by adding a provision for the interim use of railroad rights-of-way as recreational trails.[1]

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[1] Although § 1247(d) was enacted in a single paragraph, it is useful to separate its three sentences:

[1] The Secretary of Transportation, the Chairman of the Interstate Commerce Commission, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform

(continued)

National Trails System Act Amendments of 1983, Pub.L.No. 98-11, § 208 (1983), (codified at 16 U.S.C. § 1247(d)). In September 1986 the Missouri-Kansas-Texas Railroad Company ("M-K-T"), pursuant to 49 U.S.C. § 10903, filed an application with the ICC to abandon approximately 200 miles of a railroad right-of-way between Machens and Sedalia, Missouri. In October 1986 the Missouri Department of Natural Resources ("DNR") filed a protest to M-K-T's application with the ICC in which it invoked § 1247(d) and requested the ICC to issue a Certificate of Interim Trail Use ("CITU") to it pursuant to § 1247(d) and the regulations promulgated thereunder. 49 C.F.R. § 1152.29 (1986). The CITU would authorize and direct interim use of the railroad right-of-way for a recreational trail while requiring retention and maintenance of the railroad corridor for reinstatement of rail service in the future. On March 6, 1987, the ICC

(ftn. continued)
Act of 1976 . . . shall encourage state and local agencies and private interests to establish appropriate trails using the provisions of such programs.

[2] Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.

[3] If a state, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Commission shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

concluded that the railroad should be relieved of its present service obligations and, to facilitate preservation of the line and its use in the interim as a trail, authorized the issuance of a CITU, *Missouri-Kansas-Texas Railroad Company — Abandonment — St. Charles, Warren, Montgomery, Calloway, Boone, Howard, Cooper and Pettis County, Mo.*, ICC No. AB-102 (Sub-No. 13), served March 16, 1987. On April 22, 1987, the ICC issued the CITU. *Missouri-Kansas-Texas Railroad Company — Abandonment — St. Charles, Warren, Montgomery, Calloway, Boone, Howard, Cooper and Pettis County, Mo.*, ICC No. AB-102 (Sub-No. 13), served April 27, 1987.

As a consequence plaintiffs filed the present action in which they challenge the transfer of interest in the railroad right-of-way from M-K-T to DNR. Plaintiffs named M-K-T, DNR and Frederick A. Brunner, the director of DNR, as defendants. However, by subsequent order of the Court, the United States of America and eleven environmental and recreational interest groups ("Interest Groups") were permitted to intervene as defendants.[2] In addition, the Court granted the American Farm Bureau Federation and the Missouri Farm Bureau Federation leave to file briefs in support of plaintiffs as amici curiae.

In their complaint, plaintiffs allege that their predecessors in interest granted a right-of-way over their property to the predecessors in interest of M-K-T. A representative conveyance attached as Exhibit B to their complaint, and executed by the predecessors in interest of one of the plaintiffs and M-K-T, indicates that the right-of-way was conveyed

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[2] The Interest Groups are the Conservation Federation of Missouri, the National Wildlife Federation, the Rails to Trails Conservancy, the Lewis and Clark Nature Trail Foundation, the Sierra Club, the Paralyzed Veterans of America, BICYCLE USA, the Lewis and Clark Heritage Foundation, the American Hiking Society, the Katy Missouri River Trail Association and the American Rivers Conservation Council.

"for the purpose of a Railroad, and for no other purpose" and that the railroad is only "to have and hold" this right-of-way "for the purpose of establishing, constructing and maintaining a Railroad on the said lands . . . conveyed. . . ." As the alleged owners of the fee underlying the right-of-way, plaintiffs contend that but for § 1247(d) their reversionary interests in the right-of-way would have vested in them under state law upon M-K-T's decision to abandon its line and that M-K-T would therefore have no interest in the right-of-way to transfer to DNR.

Plaintiffs ostensibly challenge § 1247(d), the ICC regulations implementing § 1247(d) and the ICC order of March 6, 1987 applying § 1247(d) and the regulations to the M-K-T right-of-way. Plaintiffs advance numerous theses in support of their challenge, primarily that § 1247(d) and the ICC's regulations and order of March 6, 1987 constitute: (1) an invalid exercise of the commerce clause power under Article I, Section 8 of the United States Constitution; (2) an impermissible impairment of the obligation of contracts under Article I, Section 10 of the United States Constitution; (3) a violation of due process under the fifth and fourteenth amendments of the United States Constitution; (4) a taking of property without just compensation under the fifth amendment of the United States Constitution; and (5) a violation of various Missouri constitutional and statutory provisions. As a result plaintiffs request the Court to declare § 1247(d) and the ICC's regulations and order of March 6, 1987 unconstitutional and to quiet title in plaintiffs of their respective interests in the M-K-T right-of-way. The Interest Groups have also filed a counterclaim against plaintiffs in which they request the Court to declare § 1247(d) and the ICC's regulations and order constitutional.

Presently before the Court are plaintiffs' motion for summary judgment,[3] defendants M-K-T, DNR and Brunner's motion for summary judgment, defendant Interest Groups' motion for judgment on the pleadings or, in the alternative, for summary judgment, and defendant United States' motion for partial summary judgment. For the following reasons, and upon consideration of the arguments advanced by the parties, the Court grants defendants' motions for summary judgment and denies plaintiffs' motion for summary judgment.

A. Jurisdiction

[1] The Court has jurisdiction to consider plaintiffs' challenge to § 1247(d) under 28 U.S.C. §§ 1331 and 1337(a). However, the Court is without jurisdiction to consider their challenge to the ICC's regulations implementing § 1247(d) and to its order of March 6, 1987 applying § 1247(d) and the implementing regulations to the M-K-T right-of-way. Under 28 U.S.C. § 2321, proceedings "to enjoin or suspend, in whole or in part, a rule, regulation, or order of the [ICC]" are to be brought in the federal circuit courts of appeal in accordance with the Hobbs Act, 28 U.S.C. § 2341, *et seq.* Under the applicable provision of the Hobbs Act, the federal circuit courts of appeal have exclusive jurisdiction to ". . . determine the validity of . . . all rules, regulations, or final orders of the [ICC] made reviewable by [28 U.S.C. § 2321]." 28 U.S.C. § 2342. Thus the federal circuit courts of appeal have exclusive jurisdiction to consider plaintiffs' challenge to the ICC's implementing regulations and order of March 6, 1987. Accordingly, the Court considers only plaintiffs' challenge to

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[3] The American Farm Bureau Federation and the Missouri Farm Bureau Federation have also filed as amici curiae a memorandum in support of plaintiffs' motion for summary judgment.

§ 1247(d) and dismisses so much of their complaint which seeks to challenge the ICC's regulations and order.

B. The Commerce Clause

Plaintiffs and amici curiae contend that Congress exceeded its power under the commerce clause by enacting § 1247(d) because the regulatory scheme embodied in § 1247(d) is not reasonably related to Congress's avowed purpose of preserving railroad rights-of-way for future reactivation of rail service. By electing to postpone railroad abandonments and the vesting of landowners' reversionary interests in railroad rights-of-way, Congress "cheat[ed] landowners out of their reversionary rights" under the pretext of "railbanking" so as to encourage the development of recreational trails. *See* Amici Curiae's Memorandum in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiff-Intervenor's Motion for Summary Judgment at 14-21. The Court finds such an argument to be without merit.[4]

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[4] Indeed, the argument is somewhat abstruse. First, it assumes that § 1247(d) can only be sustained under the commerce clause if the Court finds that Congress' sole purpose in enacting § 1247(d) was to further its "railbanking" goals. But the Court is of the view that § 1247(d) might also be sustained as a means of furthering the recreational and conservational goals of the National Trails System Act. Second, it asks the Court to hold the statute unconstitutional on the basis of an alleged illicit legislative motive despite the "familiar principle of constitutional law that [a] court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383, 88 S.Ct. 1673, 1682, 20 L.Ed.2d 672 (1968). Nevertheless, as the parties have addressed the argument within the framework of plaintiffs and amici curiae's analysis, the Court shall do the same.

(i) Standard of Review

[2] A court's task in evaluating a particular exercise of congressional power under the commerce clause is "relatively narrow." *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 276, 101 S.Ct. 2352, 2360, 69 L.Ed.2d 1 (1981). First, "[t]he court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding." *Hodel*, 452 U.S. at 276, 101 S.Ct. at 2360 (citations omitted). Second, when the court satisfies itself that the regulated activity does affect interstate commerce, it must determine "whether 'the means chosen by [Congress is] reasonably adapted to the ends permitted by the Constitution.' " *Hodel*, 452 U.S. at 276, 101 S.Ct. at 2306 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262, 85 S.Ct. 348, 360, 13 L.Ed.2d 258 (1964)). "The judicial task is at an end once the court determines that Congress acted rationally in adopting a particular regulatory scheme." *Hodel*, 452 U.S. at 276, 101 S.Ct. at 2360. Such limited judicial review is required as the commerce clause constitutes a "grant of plenary authority to Congress." *Hodel*, 452 U.S. at 276, 101 S.Ct. at 2360. *See also State of Texas v. United States*, 730 F.2d 339 (5th Cir.), *cert. denied*, 469 U.S. 892, 105 S.Ct. 267, 83 L.Ed.2d 203 (1984) (applying "minimal scrutiny" to uphold under the commerce clause the constitutionality of §§ 201, 202, 203 and 214 of the Staggers Rail Act of 1980, 49 U.S.C. §§ 10501, 10701a, 10709 and 11501).

[3] In their challenge to § 1247(d), plaintiffs and amici curiae do not contend that § 1247(d) is a regulation of an activity which does not affect interstate commerce. Rather, they contend that the regulatory scheme embodied in § 1247(d) is not reasonably adapted to Congress' announced purpose of preserving soon-to-be abandoned railroad rights-of-way for future reactivation of rail service. However, as

Congress' prior legislation with respect to railroad abandonments and the circumstances surrounding its enactment of § 1247(d) demonstrate, Congress rationally elected to postpone railroad abandonments and to encourage interim trail use as a means of furthering its "railbanking" purpose. Simply stated, § 1247(d) evidences a "reasonable relation[ship] between the means selected and the end desired." *State of Texas v. United States*, 730 F.2d 339, 350 (5th Cir.), *cert. denied*, 469 U.S. 892, 105 S.Ct. 267, 83 L.Ed.2d 203 (1984).

(ii) Railroad Abandonments: The Statutory Framework

By enacting the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, Congress granted the ICC broad authority to regulate the activities of interstate rail carriers, including their decisions to abandon a railroad line. *Chicago & N.W. Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 313, 101 S.Ct. 1124, 1128, 67 L.Ed.2d 258 (1981). Indeed, Congress vested in the ICC "exclusive" and "plenary" authority over railroad abandonments. *Kalo Brick*, 450 U.S. at 321, 101 S.Ct. at 1132. Such authority "is critical to the congressional scheme, which contemplates comprehensive administrative regulation of interstate commerce." *Kalo Brick*, 350 U.S. at 321, 101 S.Ct. at 1132.

Generally speaking, a railroad may only discontinue operations or abandon a railroad line if it obtains the approval of the ICC. 49 U.S.C. § 10903.[5] Section 10903 provides in pertinent part as follows:

> (a) A rail carrier providing transportation subject to the jurisdiction of the [ICC] . . . may —

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[5] The procedures a railroad must follow in seeking ICC approval are set forth in 49 U.S.C. § 10904.

> (1) abandon any part of its railroad lines; or
>
> (2) discontinue the operation of all rail transportation over any part of its railroad lines; only if the [ICC] finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance. . . .

In determining whether to approve a proposed abandonment or discontinuance, the ICC "must balance 'the interests of those now served by the present line on the one hand, and the interests of the carrier and the transportation system on the other.' " *Kalo Brick*, 450 U.S. at 321, 101 S.Ct. at 1132 (quoting *Purcell v. United States*, 315 U.S. 381, 384, 62 S.Ct. 709, 711, 86 L.Ed. 910 (1942)). Once the ICC strikes the balance, "its conclusion is entitled to considerable deference." *Kalo Brick*, 450 U.S. at 321, 101 S.Ct. at 1132.

Under 49 U.S.C. § 10905, and whenever the ICC finds that the public convenience and necessity require or permit abandonment or discontinuance of a particular railroad line, the ICC must publish its finding in the Federal Register so as to afford a person who wishes to prevent the abandonment or discontinuance an opportunity either to purchase or subsidize the line for continued operation. 49 U.S.C. § 10905(c); *Hayfield N.R.R. v. Chicago & N.W. Transportation Co.*, 467 U.S. 622, 629, 104 S.Ct. 2610, 2615, 81 L.Ed.2d 527 (1984). If an offer is forthcoming, the railroad and the offeror will be granted an opportunity to negotiate an agreement. If an agreement is not reached, either party may request the ICC to set the terms and conditions for the transaction. 49 U.S.C. § 10905(e). When the ICC sets the terms and conditions, the railroad is bound by them, but the offeror is not. 49 U.S.C. § 10905(f). The purpose of 49 U.S.C. § 10905 is to "accommodate the conflicting interests of railroads that desire to unburden themselves quickly of unprofitable lines and shippers that are dependent upon continued rail service." *Hayfield*, 467 U.S. at 630, 104 S.Ct. at 2615.

Finally, and again only when the ICC determines that the public convenience or necessity require or permit abandonment or discontinuance of a particular railroad line, the ICC must find whether the particular line is "suitable for use for public purposes, including highways, other forms of mass transportation, conservation, energy production or transmission, or recreation." 49 U.S.C. § 10906. If the ICC finds that the line is suitable for use for public purposes, it "may be sold, leased, exchanged or otherwise disposed of" only upon the conditions imposed by the ICC. Such conditions may include a prohibition against the sale of the line for up to 180 days unless the line has first been offered for sale, upon reasonable terms, for public purposes. In contrast to its power under § 10905, however, the ICC cannot set the terms upon which the railroad must sell the line. It may only postpone abandonment for up to 180 days.

As a general matter once the ICC has authorized an abandonment pursuant to a certificate of abandonment, the ICC's jurisdiction over the railroad line is terminated. *Hayfield*, 467 U.S. at 633, 104 S.Ct. at 2617. However, as the *Hayfield* Court made clear, the ICC may extend its jurisdiction and impose post-abandonment conditions when it is expressly authorized to do so by statute. *Hayfield*, 467 U.S. at 633, 104 S.Ct. at 2617. Thus, under 49 U.S.C. § 10906, it may postpone abandonment for up to 180 days after the issuance of a certificate of abandonment. Nevertheless, when no such condition is imposed, " 'the disposition of rail property after an effective certificate of abandonment has been exercised is a matter beyond the scope of the [ICC's] jurisdiction. . . .' " *Hayfield*, 467 U.S. at 634, 104 S.Ct. at 2617 (quoting *Abandonment of Railroad Lines and Discontinuance of Service*, 365 I.C.C. 249, 261 (1981)). In that event, " '[q]uestions of title to, and disposition of, the property are . . . matters subject to state law.' " *Id.*

(iii) Congress' Development of a National Railbanking Policy

In the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), Pub.L. No. 94-210, 90 Stat. 31 (codified as amended at 45 U.S.C. §§ 801-855), Congress evidenced its concern over railroad abandonments and their consequent effect on the interstate rail network.[6] Under Section 809(a)(2) of the 4-R Act, it directed the Secretary of Transportation to preare a report "evaluating the advantages of establishing a rail bank consisting of selected [abandoned railroad] rights-of-way" and discussing "interim uses for such rights-of-way." 90 Stat. 144, 145. In the ensuing report, the Secretary documented the validity of Congress' concern. United States Department of Transportation, *Availability and Use of Abandoned Railroad Rights-of-Way* (1977) ("Report"). In the previous seven years, rail carriers had either abandoned or had pending applications to abandon 21,000 miles of railroad track in the continental United States. *Report*, at 3. Moreover, the American Association of Railroads estimated that the nation's remaining 200,000

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[6] Congress' concern was not new. In enacting the Regional Rail Reorganization Act of 1973 ("3-R Act"), Pub.L. No. 93-236, 87 Stat. 985 (codified as amended at 45 U.S.C. §§ 701-797m), Congress was responding to the bankruptcy of certain railroads in the northeast and midwest regions of the country which it believed threatened the national welfare. *See State of Texas v. United States*, 730 F.2d 339, 344 (5th Cir.), *cert. denied*, 469 U.S. 892, 105 S.Ct. 267, 83 L.Ed.2d 203 (1984). The legislation created the United States Railway Association and directed it to develop a plan for the reorganization of railroads in the northeast and midwest into an economically viable rail transportation system. Harbridge House, Inc., *Availability and Use of Abandoned Rights of Way* 1 (1977). One of the goals of the plan was "the preservation . . . of existing patterns of service by railroads (including short-line and terminal railroads), and of existing railroad trackage in areas in which fossil fuel natural resources are located. . . ." Section 206(a), 87 Stat. 994.

miles of track would be reduced by a further twenty percent over the next decade. *Report*, at 3. Not surprisingly, the Secretary concluded that abandoned railroad rights-of-way constitute a "significant problem," albeit one ripe for "opportunity." *Report*, at 3.

Under the 4-R Act, Congress also enacted substantive measures to alleviate the problem. Section 803, codified at 49 U.S.C. App. § 1654(f)-(o), directed the Secretary of Transportation to provide financial assistance to states for freight assistance programs designed to cover the continuation of rail service, the purchase of rail lines to maintain existing or to provide for future rail service, the rehabilitation and improvement of rail lines and the cost of reducing the costs of lost rail service in a manner less expensive than continuing rail service. Section 810 directed the Secretary of Transportation to establish a federal rail bank for the purpose of preserving existing service to areas in which fossil fuel natural resources or agricultural production are located.[7] Section 809(b) directed the Secretary of the Interior to provide financial assistance to all governmental entities "for programs involving the conversion of abandoned railroad rights-of-way to recreation and conservational uses. . . ." Finally, Section 809(c), codified at 49 U.S.C. § 10906, required the ICC to consider whether railroad rights-of-way appropriate for abandonment would serve other public uses.

Although in his Report the Secretary of Transportation did not directly address interim trail use of a railroad right-of-way appropriate for abandonment, the final report of the

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[7] In his Report, the Secretary was concerned that § 803 and § 810 created two distinct rail banking programs which were not wholly consistent with one another and which were separately administered by the states and the federal government. *Report* at 37. His concern was that such concurrent administration "would create confusing and complex administrative problems." *Id.* In the Local Rail Service Assistance Act of 1980, Pub.L. No. 95-607, 92 Stat. 3064, Congress repealed § 810.

Harbridge House regarding railbanking and from which the Secretary derived his Report, recognized that such "social benefits" as a "biking or hiking trail" could be realized from such a use. Harbridge House, Inc., *Availability and Use of Abandoned Rights of Way* III-11 (1977) ("Harbridge Report"). However, the Harbridge Report noted that such interim use would shift "the purpose of the rail bank from a passive custodial role to an active one, with attendant administrative and management problems". *Harbridge Report*, at III-11. Furthermore, it noted that such use might constitute an abandonment under state law. *Harbridge Report*, at IV-7. As a result, and since "railbanking itself is in a nascent stage," it discouraged a contemporaneous implementation of an interim use program. *Harbridge Report*, at III-12.

(iv) Section 1247(d)

Under § 1247(d), Congress granted interested parties the opportunity to use, for recreational purposes, and to preserve, for future rail service, railroad rights-of-way which have been approved for abandonment. Section 1247(d) provides that if interim trail use "is subject to restoration or reconstruction for railroad purposes" then such use "shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." It also provides that if a qualified public or private entity is prepared to assume full responsibility for the management of the right-of-way and for any liability arising out of its transfer or use, the ICC "shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with [the National Trails System Act], and shall not permit abandonment or discontinuance inconsistent or disruptive of such use."

In its decision construing § 1247(d), and accompanying its issuance of final implementing rules, the ICC concluded that

§ 1247(d) applies only when a railroad voluntarily enters into an interim trail use agreement and only when the right-of-way is subject to future reconstruction and reactivation of rail service.[8] *Rail Abandonments — Use of Rights-of-Way as Trails*, ___ I.C.C.2d ___ (served May 6, 1986). More specifically, it concluded that:

> (a) Section 1247(d) does not give the [ICC] the power to condemn railroad rights-of-way for interim trail use and rail banking;
>
> (b) Railroads and prospective interim trail users may voluntarily enter into agreements to use rights-of-way;
>
> (c) Interim trail use under section 1247(d) is subject to reactivation of rail service by the owner of the right-of-way and subject to the interim user continuing to take full responsibility for liability in connection with trail use, and for managing and paying taxes on the rights-of-way; and
>
> (d) Section 1247(d) preempts state laws that would otherwise result in extinguishment of easements for railroad purposes and reversion of rights-of-way to abutting landowners.

Rail Abandonments, slip op. at 6. In conformity with these conclusions, the ICC issued final implementing rules. 49 C.F.R. §§ 1105 and 1152.

Under its final rules, when the ICC finds that a railroad right-of-way is appropriate for abandonment under 49 U.S.C. § 10903 and when a qualified public or private entity offers to maintain the right-of-way for interim trail use, the ICC

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[8] The Court of Appeals for the Ninth Circuit has subsequently upheld the ICC's interpretation of § 1247(d) as requiring a voluntary agreement between the abandoning railroad and the prospective interim trail user. *See Washington State Dept. of Game v. I.C.C.*, 829 F.2d 877 (9th Cir. 1987).

issues a CITU. The CITU permits the railroad to discontinue rail service, cancel tariffs and salvage track and other equipment. *Rail Abandonments*, slip op. at 17. It further provides the railroad and the prospective interim trail user 180 days to negotiate an interim trail use agreement. *Rail Abandonments*, slip op. at 17. If no agreement is reached, "then the CITU will convert into an effective certificate of abandonment, permitting the railroad to abandon the line immediately." *Rail Abandonments*, slip op. at 17. If, however, an agreement is reached, the ICC will permit interim trail use and hold in abeyance its authorization to abandon the right-of-way. *Rail Abandonments*, slip op. at 17. Should the trail user thereafter seek to terminate its use of the right-of-way, it must file a "petition to reopen the abandonment proceeding" so that the ICC may "issue a certificate of abandonment to the railroad and to the trail user." *Rail Abandonments*, slip op. at 17.

By enacting § 1247(d), Congress explicitly seeks to further "the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use" while at the same time to allow for interim trail use "in a manner consistent with [the National Trails System Act]." Indeed, and as the legislative history to § 1247(d) makes clear, Congress was acting out of concern over the failure of prior efforts to establish a "process through which railroad rights-of-way which are not immediately necessary for active service can be utilized for trail purposes." H.R.Rep. No. 98-28, 98th Cong., 1st Sess. 1, 8, *reprinted in* U.S. Code Cong. & Ad.News 1983, pp. 112, 119. Such prior efforts failed in large part because once a railroad right-of-way is abandoned and no longer subject to the ICC's jurisdiction, it usually reverts under state law to the owners of the fee underlying the railroad right-of-way and therefore cannot be conveyed by the railroad for a non-railroad purpose. *See, e.g., Lawson v. State of Washington,*

107 Wash.2d 444, 730 P.2d 1308 (1986); *Schnabel v. County of DuPage*, 101 Ill.App.2d 533, 57 Ill.Dec. 121, 428 N.E.2d 671 (1981); *Pollnow v. Department of Natural Resources*, 88 Wis.2d 350, 276 N.W.2d 738 (1979). Accordingly, "[t]he key finding of § 1247(d)] is that interim use of a railroad right-of-way for trail use, when the route itself remains intact for future railroad purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes." H.R.Rep. No. 98-28, 98th Cong., 1st Sess. 1, 8, *reprinted in* U.S. Code Cong. & Ad.News pp. 112, 119. *See also Baltimore & Ohio Railroad Co. — Exemption — Abandonment in Richland County, Ohio*, ICC No. AB-19 (Sub.-No. 121X), served March 18, 1987 ("[t]he key purpose of section § 1247(d) is to preserve the status of a right-of-way as a line of railroad in order that it may remain intact for future railroad purposes by providing for interim trail use *before* abandonment occurs. . . .").

As both the plain language of § 1247(d) and its legislative history indicate, § 1247(d) is designed to further the rail-banking policies of the 4-R Act and to encourage the recreational and conservational policies of the National Trails System Act. It is intended to "protect railroad interests by providing that the right-of-way can be maintained for future railroad use even though service is discontinued and tracks removed" and to "assist recreational users by providing opportunities for trail use on an interim basis where such situation exists." H.R.Rep. No. 98-28, 98th Cong., 1st Sess. 1, 9, *reprinted in* U.S. Code Cong. & Ad.News 1983, pp. 112, 120. By serving both interests, it reflects, to borrow the words of the Secretary of Transportation, Congress' awareness that railroad abandonments constitute a "significant problem," ripe for "opportunity."

(v) Commerce Clause Analysis

Given Congress' "plenary" authority under the commerce clause, its enactment of the statutory abandonment framework, particularly 49 U.S.C. § 10906 which encourages alternate public uses of railroad rights-of-way which are abandoned but not railbanked, its underlying concern with the effect of railroad abandonments on the interstate rail network which gave rise to the 4-R Act, and its frustration over the failure of prior railbanking efforts, the Court can only conclude that Congress acted rationally in enacting § 1247(d) by electing to postpone railroad abandonments and to encourage interim trail use so as to further its railbanking purpose. The means selected are reasonably related to the end desired. *State of Texas v. United States*, 730 F.2d 339, 350 (5th Cir.), *cert. denied*, 469 U.S. 892, 105 S.Ct. 267, 83 L.Ed.2d 203 (1984). Here the Court's "relatively narrow" task in evaluating § 1247(d) under the commerce clause must conclude. *Hodel*, 452 U.S. at 276, 101 S.Ct. at 2360.

But plaintiffs and amici curiae would extend the Court's task still further. Specifically, they contend that the means chosen by Congress are particularly ineffective to achieve its railbanking purpose inasmuch as § 1247(d) would only effect five percent of all railroad rights-of-way which are proposed for abandonment and as its implementation rests on the railroad and the prospective trail user rather than on Congress or the ICC. *See* Plaintiffs' Memorandum in Opposition to Motion of the United States . . . for Summary Judgment and to Supplement Plaintiffs' Previously Filed Memoranda in Support of their Motion for Summary Judgment at 7-15. Assuming the truth of their contention, it is of no avail. "[T]he effectiveness of existing laws in dealing with a problem identified by Congress is ordinarily a matter committed to legislative judgment." *Hodel*, 452 U.S. at 283, 101 S.Ct. at 2364. Here, as in *Hodel*, "Congress considered the effectiveness of existing laws and concluded

that additional measures were necessary to deal with the interstate commerce effects" of railroad abandonments. *Hodel*, 452 U.S. at 283, 101 S.Ct. at 2364. It then responded, rationally, by enacting § 1247(d).

C. Impairment of the Obligation of Contracts and the Due Process Clause of the Fifth Amendment

Plaintiffs and amici curiae contend that § 1247(d) constitutes an impermissible impairment of the obligation of contracts under Article I, Section 10 of the United States Constitution and a violation of the due process clause under the fifth amendment of the United States Constitution. In essence, they contend that the right-of-way agreements entered into between plaintiffs' and M-K-T's predecessors in interest constitute contracts under state law and that such contracts are impaired to the extent that § 1247(d) interferes with plaintiffs' right to exercise full fee simple ownership over the rights-of-way. The Court finds that this argument is not meritorious.

[4] At the outset, the Court notes that Article I, Section 10 applies only to state, not federal, legislation.[9] *See Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947, 959 (6th Cir.), *aff'd*, 446 U.S. 559, 100 S.Ct. 1723, 64 L.Ed.2d 354 (1980); *Speckmann v. Paddock Chrysler Plymouth, Inc.*, 565 F.Supp. 469, 473 (E.D.Mo. 1983). As § 1247(d) is a federal statute, analysis of plaintiffs' and amici curiae's claim under Article I, Section 10 is inappropriate. However, to the extent that they contend § 1247(d) unconstitutionally impairs a private contractual

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[9] Article I, Section 10 provides in pertinent part: "*No State* shall . . . pass any . . . law impairing the Obligation of Contracts." (emphasis added).

right, analysis under the due process clause of the fifth amendment is appropriate.

[5] Under such an analysis, plaintiffs must demonstrate both that § 1247(d) alters contractual rights or obligations and, if an impairment is found, that it is of constitutional dimension. *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 105 S.Ct. 1441, 1455, 84 L.Ed.2d 432 (1985). If the alteration of contractual rights or obligations is minimal, the court's inquiry may end; if, however, it is substantial, the court must look more closely at the legislation. *National R.R. Passenger Corp.*, 105 S.Ct. at 1455. The court's inquiry nevertheless remains limited. "The party asserting a Fifth Amendment due process violation must overcome a presumption of constitutionality and 'establish that the legislature has acted in an arbitrary and irrational way.' " *National R.R. Passenger Corp.*, 105 S.Ct. at 1455 (quoting *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729, 104 S.Ct. 2709, 2717, 81 L.Ed.2d 601 (1984)).

Assuming without deciding that the right-of-way agreements entered into between plaintiffs' and M-K-T's predecessors in interest, created contractual rights in plaintiffs, and that these rights are substantially impaired by reason of § 1247(d), plaintiffs still cannot meet their burden of demonstrating that Congress acted in "an arbitrary and irrational way" when it enacted § 1247(d). As the discussion in Part B of this memorandum indicates, Congress acted rationally in enacting § 1247(d) by electing to postpone railroad abandonments and to encourage interim trail use so as to further its railbanking purpose. Accordingly, plaintiffs' claim under the due process clause of the fifth amendment must fail.

D. The Takings Clause of the Fifth Amendment

Plaintiffs and amici curiae seek a declaration that § 1247(d) is unconstitutional as applied to plaintiffs as it constitutes a taking of their property without just compensation.[10] Specifically, they contend that § 1247(d) constitutes a temporary regulatory taking of plaintiffs' property as it postpones the vesting of plaintiffs' reversionary interests in the M-K-T right-of-way without affording them an adequate remedy at law. As plaintiffs' request for equitable relief is inappropriate, and as they have an adequate remedy under the Tucker Act, 28 U.S.C. § 1491, the Court finds their argument lacking in merit.

[6] The fifth amendment provides in pertinent part that ". . . private property [shall not] be taken for public use, without just compensation." As its language indicates, and as the Supreme Court has frequently observed, the amendment "does not prohibit the taking of private property, but

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[10] To the extent plaintiffs and amici curiae's claim may be construed as a facial challenge to § 1247(d), it is without merit. Under such a challenge, the only issue before the Court is whether the "mere enactment of § 1247(d) constitutes a taking." *Hodel*, 452 U.S. at 295, 101 S.Ct. at 2370 (citation omitted). The mere enactment of a statute does not effect a taking of property if it advances legitimate governmental interests and if it does not deny an owner economically viable use of this property. *Agins v. Tiburon*, 447 U.S. 255, 260-63, 100 S.Ct. 2138, 2141-43, 65 L.Ed.2d 106 (1980). First, § 1247(d) clearly advances legitimate governmental interests. Second, it will not deny an owner economically viable use of his property in all situations. For instance, a railroad which owns a fee interest in a right-of-way may wish to enter into an agreement with a prospective interim trail user so as to relieve itself of its financial obligations to maintain the right-of-way until it is ready to resume service on the right-of-way or to sell it to another rail carrier. No taking would occur here as the railroad is neither obligated to enter into negotiations with a prospective trail user nor obligated to enter into an agreement with it.

instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church v. Los Angeles City*, ___ U.S. ___, 107 S.Ct. 2378, 2385, 96 L.Ed.2d 250 (1987) (citations omitted). Its purpose is "not to limit . . . governmental interference with property rights *per se*"; rather, it is "to secure *compensation*" in the event such interference occurs. *First English*, 107 S.Ct. at 2386. Thus when the government effectuates a taking it "necessarily implicates the 'constitutional obligation to pay just compensation.' " *First English*, 107 S.Ct. at 2386 (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960)). Moreover, the amendment does not require that just compensation be paid in advance of, or contemporaneously with, the taking. *Ruckleshaus v. Monsanto Co.*, 467 U.S. 986, 1016, 104 S.Ct. 2862, 2879-80, 81 L.Ed.2d 815 (1984). All that it requires is that a " 'reasonable, certain and adequate provision for obtaining compensation' " exist at the time of the taking. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25, 95 S.Ct. 335, 349, 42 L.Ed.2d 320 (1974) (quoting *Cherokee Nation v. Southern Kansas R.R.*, 135 U.S. 641, 659, 10 S.Ct. 965, 971, 34 L.Ed. 295 (1890)).

[7, 8] Accordingly, and so long as a suit for compensation may be brought subsequent to the taking, equitable relief is not available to enjoin the government, duly authorized by law, from taking private property for a public use. *Monsanto*, 467 U.S. at 1016, 104 S.Ct. at 2879-80 (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697 n. 18, 69 S.Ct. 1457, 1465, n. 18, 93 L.Ed. 1628 (1949)). When, as in this instance, property owners allege the United States has taken their property, compensation must ordinarily be sought in the United States Claims Court under the Tucker Act, 29 U.S.C. § 1491.[11] *Monsanto*, 467

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[11] The Tucker Act, 28 U.S.C. § 1491, provides in pertinent part:

The United States Claims Court shall have jurisdiction to

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U.S. at 1016, 104 S.Ct. at 2879-80 (citations omitted). If the property owners do not avail themselves of their remedy under the Tucker Act, and if that remedy is an adequate one, their taking claims are premature. *Monsanto*, 467 U.S. at 1019, 104 S.Ct. at 2881.

[9] Plaintiffs and amici curiae contend that the Claims Court is without authority to award plaintiffs compensation as § 1247(d) does not contain any congressional authority, express or implied, for a particular taking claim. *See, e.g. Southern California Financial Corporation v. United States*, 634 F.2d 521, 225 Ct.Cl. 104 (1980). Accordingly, and as plaintiffs do not have an adequate remedy under the Tucker Act, they contend § 1247(d) should be declared unconstitutional. Their contention is severly flawed.

In determining whether a remedy is available for claims arising out of a taking pursuant to a federal statute, "the proper inquiry is not whether the statute 'expresses an affirmative showing of a congressional intent to permit recourse to a Tucker Act remedy,' " but, rather, " 'whether Congress has in the [statute] *withdrawn* the Tucker Act grant of jurisdiction to the [Claims Court]. . . .' " *Monsanto*, 467 U.S. at 1017, 104 S.Ct. at 2880 (quoting *Regional Rail*

(ftn. continued)

> render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. The Supreme Court has held that "[i]f there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the [Claims Court] to hear and determine." *United States v. Causby*, 328 U.S. 256, 267, 66 S.Ct. 1062, 1068-69, 90 L.Ed. 1206 (1946). However, the district courts also have concurrent jurisdiction to consider all claims against the United States which are "founded upon the Constitution" and which do not exceed $10,000 in amount.

Reorganization Act Cases, 419 U.S. at 126, 95 S.Ct. at 350). Indeed, and as previously noted, when the government effectuates a taking, it has impliedly promised to pay just compensation and has afforded a remedy for its recovery by a suit under the Tucker Act. *Yearsley v. Ross Construction Co.*, 309 U.S. 18, 21, 60 S.Ct. 413, 414-15, 84 L.Ed. 554 (1940).

Altogether absent in § 1247(d) or its legislative history is a discussion of the interaction between § 1247(d) and the Tucker Act. As the Tucker Act grants the Claims Court "jurisdiction to render judgment upon any claim against the United States founded . . . upon the Constitution," this Court would have to infer a withdrawal of jurisdiction with respect to takings under § 1247(d) either from the structure of the statute or its legislative history. Such a withdrawl of jurisdiction would amount to a partial repeal of the Tucker Act. *Monsanto*, 467 U.S. at 1017, 104 S.Ct. at 2880. As the Supreme Court has often recognized, however, "repeals by implication are disfavored." *Monsanto*, 467 U.S. at 1017, 104 S.Ct. at 2880 (citations omitted). Moreover, if § 1247(d) and the Tucker Act are " 'capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.' " *Regional Rail Reorganization Act Cases*, 419 U.S. at 133-34, 95 S.Ct. at 353 (quoting *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290 (1974)).

Plaintiffs and amici curiae argue that Congress withdrew the Tucker Act remedy in § 1247(d), as it failed to include any provision for compensation in § 1247(d) and expressly declined to appropriate any funds for the acquisition of land for the Lewis and Clark National Historic Trail in 16 U.S.C. § 1249(c)(1), which they allege in conclusional fashion includes the M-K-T right-of-way. These arguments are unavailing. First, and as discussed above, the fact that Congress failed to include any provision for compensation in § 1247(d) is of no import, as it has "impliedly promised" to

pay just compensation via the Tucker Act if the government is found to have effectuated a taking. Second, and as the Interest Groups have amply demonstrated in their responsive memoranda, the M-K-T right-of-way is not now a part of the Lewis and Clark National Historic Trail.[12]

As discussed in Part B of this memorandum, the "key finding" of § 1247(d) is that interim trail use of railroad rights-of-way which are authorized for abandonment and which are subject to future reactivation of rail service "shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." *See* H.R.Rep. No. 98-28, 98th Cong., 1st Sess. 1, 8 *reprinted in* U.S. Code Cong. & Ad.News 1983, pp. 112, 119. In making such a finding, Congress did not address the liability of the United States to pay just compensation if a taking be found to have occurred. Congress either did not believe that the postponement of a railroad's abandonment of a right-of-way constituted a taking or assumed that the general grant of jurisdiction under the Tucker Act would provide a necessary remedy for any taking that might be found to have occurred. In either event, Congress' failure to address

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12 Plaintiffs and amici curiae's reliance on *Southern California Financial Corp. v. United States*, 634 F.2d 521 (Cl.Ct. 1980) is likewise misplaced. Here the Claims Court reversed a trial court's award of damages against the United States in an inverse condemnation suit. Plaintiffs alleged that the Air Force, by means of successive renewable leases, had permanently taken their property for the purpose of storing bombs and ammunition. Under the Military Construction Appropriation Act. the Air Force was required to obtain the approval of Congress for land acquisitions in excess of $50,000. *Southern Cal.*, 634 F.2d at 523. The Air Force failed to do so. As the Claims Court reasoned, "[t]he Air Force could not attain the same result by camouflaging a larger taking in the guise of successive renewable leases which were not reviewable by Congress." *Southern Cal.*, 634 F.2d at 524. Thus in *Southern Cal.*, unlike here, there was no "congressional authorization, express or implied, for the particular taking." *Southern Cal.*, 634 F.2d at 523.

the issue cannot be construed to reflect an unambiguous intention to withdraw the Tucker Act remedy. Accordingly, as plaintiffs have failed to avail themselves of the Tucker Act remedy, the Court dismisses their taking claims as premature. *See Monsanto*, 467 U.S. at 1019, 104 S.Ct. at 2881.

[10] In a closely-related argument, plaintiffs and amici curiae contend that Missouri, acting through its agent DNR, effectuated a taking of plaintiffs' property without just compensation within the meaning of the fourteenth amendment.[13] The Court refuses to find such a taking. First, because they have altogether failed to come forward with any authority to demonstrate that a state, acting pursuant to a lawfully enacted federal statute, may be found to have taken property without just compensation. Second, and even if they could make such a demonstration, they have failed to show, as they are required to do if this Court is to review their claim, that they have sought compensation through the procedures provided by the state for obtaining such relief. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 3117-121, 87 L.Ed.2d 126 (1985); *First English*, 107 S.Ct. at 2389 n. 10.

E. The State Law Claims

[11] Plaintiffs and amici curiae contend that § 1247(d) violates numerous state constitutional and statutory provisions as well as state common law. Specifically, and insofar as pertinent to the Court, they contend § 1247(d) violates the due process clause contained in Article I, Section 10 of the Missouri Constitution, the impairment of the obligation of

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[13] The fifth amendment takings clause applies to the states through the fourteenth amendment. *See Chicago B & O R.R. v. Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897).

contracts clause contained in Article I, Section 13 of the Missouri Constitution and state property law. Upon a review of the arguments advanced by the parties, the Court finds that the state laws referred to above are preempted by federal law.

As the Supreme Court recently observed, the circumstances under which federal law may be said to preempt state law are familiar. *Schneidewind v. ANR Pipeline Co.*, ___ U.S. ___, 108 S.Ct. 1145, 1150, 99 L.Ed.2d 316 (1988). Congress may either explicitly define the extent to which its enactments preempt state law, or, in the absence of explicit statutory language, implicitly indicate an intent to occupy a given field to the exclusion of state law. *Schneidewind*, 108 S.Ct. at 1150. If Congress has not entirely displaced state law in a particular field, state law is preempted when it actually conflicts with federal law. *Schneidewind*, 108 S.Ct. at 1150. "Such a conflict will be found 'when it is impossible to comply with both state and federal law, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941).' " *Schneidewind*, 108 S.Ct. at 1150-51 (citations omitted).

In this case, § 1247(d) by its express terms preempts state law insofar as that law would permit reversion of the M-K-T right-of-way to plaintiffs while the right-of-way is being used on an interim basis as a trail. Moreoever, § 1247(d) is an adjunct to a federal regulatory scheme which the Supreme Court has viewed as plenary, exclusive and preemptive. *See, e.g., Chicago & N.W. Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981). Upon review, the Court concludes that the applicable state law would interfere with the federal objective of preserving railroad rights-of-way for future rail service through interim trail use and is therefore preempted.

Plaintiffs and amici curiae have not presented any colorable arguments which would lead to a contrary conclusion.

ORDER AND JUDGMENT

Pursuant to the memorandum filed herein on this date,

IT IS HEREBY ORDERED that plaintiffs' motion for summary judgment be and it is denied.

IT IS FURTHER ORDERED that defendants Missouri-Kansas-Texas Railroad Company, Department of Natural Resources and Frederick A. Brunner's motion for summary judgment, defendants Conservation Federation of Missouri, et al.'s motion for judgment on the pleadings or, in the alternative, for summary judgment, and defendant United States of America's motion for partial summary judgment be and they are granted.

In light of the foregoing,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that judgment in this action be and it is entered in favor of defendants and against plaintiffs. Accordingly, the Court declares 16 U.S.C. § 1247(d) constitutional.

APPENDIX C

SERVICE DATE
MAR 16 1987

INTERSTATE COMMERCE COMMISSION

DECISION

Docket No. AB-102 (Sub-No. 13)

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY — ABANDONMENT — IN ST. CHARLES, WARREN, MONTGOMERY, CALLAWAY, BOONE, HOWARD, COOPER AND PETTIS COUNTIES, MO

Decided: March 6, 1987

By application filed September 26, 1986,[1] the Missouri-Kansas-Texas Railroad Company (MKT) seeks to abandon its 199.92-mile line of railroad between Machens (milepost 26.92) and Sedalia, MO (milepost 226.84). Public notice was properly given. Protests were filed by Missouri Department of Natural Resources (DNR); Missouri Rail Improvement Authority (Authority); Union Electric Company (Union); and MFA Incorporated (MFA).

Comments were filed by United States Department of the Interior (DOI); Missouri Highway and Transportation Commission (Transportation Commission); Boone County Commission; City of St. Charles, MO; Town of Hartsburg, MO; Village of Rhineland, MO; St. Charles and Augusta Railroad (St.C&A); Rails-to-Trails Conservancy, National Wildlife Federation, and Conservancy Federation of Missouri (Commenters); Paraquad; St. Charles Tourism Commission;

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[1] MKT's application, initially filed August 25, 1986, was rejected by decision served September 26, 1986, due to a failure of publication.

Special Recreational Council of Greater St. Louis; Missouri Park and Recreation Association; Lewis & Clark Trail Heritage Foundation; St. Louis Disabled Voters Council; Boonsville Chamber of Commerce; Clinton Chamber of Commerce; St. Charles Quarry Company; Missouri Farm Bureau; Holiday Inn of St. Peters/St. Charles; and the following individuals: Donald J. and Delores I. Vitt, Richard H. Luecke, Pam Hinrichs, Mr. & Mrs. Richard Glass, Mary Stanley, Jeanne M. Kissell, Karl R. Barnickol, J. Donovan Larson, Carolyn Meyer, Philip G. Enns, Catherine I. Sandell, James and Kathleen M. Mikolajczak, A. W. Rueff, Helen Brune, Tim Von Engeln, Mary L. Singleton, Sidney Eldringnoff, Dee Dokken, and Mr. and Mrs. Maurice L. Glosemeyer. We will also accept a late-filed comment by the Missouri Valley Steam Engine Ass'n (MoVal). The Railway Labor Executives' Association (RLEA), the United Transportation Union (UTU) and Brotherhood of Locomotive Engineers (BLE) filed comments on behalf of employees.

Based on the protests and comments, an investigation was instituted under modified procedure. Verified statements were filed by MKT, DNR, Commenters and Union. MKT replied. Most of the comments involve a proposal that the right-of-way be designated for interim use as a trail under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act). Before we consider the Trails Act issue, we must first determine whether the public convenience and necessity require or permit abandonment.

TRAFFIC

The line is located beside the Missouri River and is part of MKT's main line between St. Louis and Parsons, KS. Most of the traffic was overhead traffic between St. Louis and the remainder of MKT's system. Some local traffic was also generated. Effective March 27, 1986, MKT was granted overhead trackage rights over a parallel line of the Missouri

Pacific Railroad Company (MP) between Sedalia and St. Louis.[2] MKT then rerouted its overhead traffic onto MP's line. MKT continued to provide service on the subject line for local traffic until October 6, 1986, when the line was embargoed. The line was heavily damaged by floods and is currently out of service. MKT asserts that the amount of local traffic generated by the line does not justify the rehabilitation expense needed to resume service.

MKT's data shows that, in 1984, it handled 44,684 carloads on the line, of which 43,778 were overhead and 906 locally generated. In 1985, it handled 45, 138 carloads, of which 44,362 were overhead and 776 locally generated. In the first three months of 1986, it handled 12,829 carloads, of which 12,594 were overhead and 235 locally generated.[3] The principal shippers were MFA, whose traffic was grain and fertilizer ingredients, and Westinghouse Electric Company (Westinghouse), whose traffic was principally petroleum, and iron and steel sheets. Before April 1986, MKT operated one train each way on the line daily. After the diversion of bridge traffic onto MP's line, MKT states it provided local service on an "as needed" basis — about one trip per month.

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[2] *See* Notice of Exemption in F.D. 30805, *Missouri-Kansas-Texas R. Co. — Trackage Rights — Missouri Pacific R. Co.* (not printed), served April 9, 1986.

[3] MKT's data shows that "significant" users generated 879 carloads in 1984, 736 carloads in 1985, and 217 carloads in the first three months of 1986.

REVENUE AND COSTS

The following cost and revenue data were submitted:

	1984	1985	Base Year 4/85 - 3/86
Revenues	$10,572,105	$12,319,883	$11,770,975
Avoidable Costs	7,091,910	6,267,023	6,428,770
Profit	3,480,195	6,052,860	5,342,205

The cost and revenue data were based on operations conducted prior to the diversion of overhead traffic onto MP's line. Therefore, MKT submits that the data does not represent a true picture of the line. It suggests that its subsidy year calculations are a more reliable indication of revenues and cost attributable to the line, for they reflect local operations. The subsidy year projects revenues of $445,425, and avoidable costs of $2,022,774, resulting in an avoidable loss of $1,577,349. We agree with MKT that its data are distorted because they include bridge traffic which need not move over the line.[4] Under these circumstances and considering that no objection has been submitted to MKT's revenue and cost data, we will accept MKT's subsidy year projection to indicate operations for the line for local traffic only.

REHABILITATION

As stated above, the line is inoperable due to flood damage and will need repair before service is resumed.

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[4] In the absence of evidence that rerouting of bridge traffic creates inefficiencies, our long standing practice is to accept railroad management rerouting decisions.

However, the amount of rehabilitation required is uncertain. MKT claims that rehabilitation of the line would cost $4,057,629. Before the line was damaged, MKT states that it maintained the line at Federal Railroad Administration (FRA) Class II standards. At that level, MKT operated the line at 25 miles per hour. MKT proposes to restore the line to Class II level. MKT notes that the expenditure for rehabilitation to resume service would be about 30 percent of its entire track and bridge maintenance budget.

Union objects that MKT's rehabilitation estimate is inflated. It claims that the cost of rehabilitation should be for the minimum FRA Class I, because MKT has not justified a higher standard. It cites *Southern Pacific Transp. Co. — Abandonment*, 360 I.C.C. 138, 144 (1979) for this proposition.

While MKT responds that the line was part of its main line, and it could not operate competitive service at the 10 mile-per-hour speed limit for a Class I line, we also question MKT's rehabilitation estimate. The overhead traffic, which was the vast amount of traffic handled up to April 1986, is now being moved on MP's line. Thus, the traffic level on the subject line would be substantially reduced. Also service levels would be reduced to an "as needed" basis to handle only local traffic.

In view of these circumstances, MKT has not justified rehabilitation of the line to Class II levels. Nevertheless, we recognize that substantial repairs would be required before service could be resumed. Without alternative cost estimates, we cannot recompute the rehabilitation that is needed to restore the line to Class I standards. Accordingly, we can conclude only that considerable rehabilitation is necessary, but the cost for that rehabilitation is uncertain.

OPPORTUNITY COST

Continued operation of the line will also require MKT to incur an annual opportunity cost. Opportunity cost reflects the economic loss experienced by the carrier from foregoing a more profitable alternative use of its assets. These costs are developed by multiplying the net liquidation value (NLV) of the line by a rate of return equal to the railroad cost of capital as determined by the Commission. The most recent Commission determination of railroad cost of capital is 18.6 percent. See Ex Parta No. 274 (Sub-No. 3C) *Abandonment of R. Lines — Use of Opportunity Costs*, 1 I.C.C. 2nd 203 (1984).

MKT did not compute its opportunity cost for continued operation of the line. However, we can use MKT's unchallenged NLV of $5,859,491 in its cost data to compute opportunity cost. Under the methodology, MKT's opportunity cost would be $1,089,865, and would still be substantial even if a lower rate of return were used. We note, however, that the NLV was computed prior to the flood that damaged the line. The damage probably reduced the NLV to some extent. Nevertheless, we conclude that MKT would still incur a substantial opportunity cost, because continued operations could only be accomplished if the line were rehabilitated and additional track material were committed to the line, thereby restoring at least some of the lost value of the line that may be attributable to the flood.

SHIPPER AND COMMUNITY INTEREST

Protests and comments by DNR, civic organizations, and individuals principally concern the proposed use of the right-of-way as a trail. We will discuss these concerns below. We now discuss issues raised by shippers and community interests pertinent to the abandonment application.

Union generates and supplies electricity. It owns and operates a nuclear generating plant in Callaway County, MO, that is located near the line. The plant is connected to the line at Portland by a spur built by Union. Much of the material and equipment used to build the plant moved over the line.

Union states that it expected to use the line to transport transformers and heavy equipment to and from the plant when the plant became operational. The plant uses four 300 ton transformers; three are used to operate the plant, and one is maintained as a spare. It asserts that alternative forms of transportation to move this equipment would be more costly and are less reliable, particularly during bad weather. While the future need for such equipment is minimal, using trucks to haul a large transformer, turbine or generator could cost as much as $200,000. Energy production at the plant is inexpensive when compared to energy produced from other sources of fuel. But, according to Union, the possible inability to transport equipment could interrupt operation of the plant and require purchase of electricity from other sources costing $250,000 per day.

In addition, Union states that abandonment may have other adverse economic impacts in the area. Its plant site could be used for a second generating facility. Abandonment could discourage any such construction project and, thus, be detrimental to potential employment and economic growth in the area.

MKT responds that Union has not used the line for the heavy machinery for the past two years and has no present intent to use its service in the near future. MKT states further that it should not be obligated to rehabilitate the line because of an undefined potential need for rail service, especially to transport equipment that has a low failure rate.

MFA contends that abandonment will result in higher fertilizer costs and lower grain prices. It argues further that there are not enough trucks to handle its grain harvest. The

Authority and MFA want MKT to reinstall an interchange with MP at Booneville. The interchange, they assert, will continue rail access to industries thereby enhancing economic development.

MKT responds that the connection was taken out of service several years ago because there was no need for the connection. To restore the connection would cost $30,000 and require rehabilitation of 4,000 feet of track. MKT asserts that the amount of traffic generated at Booneville does not justify reconstructing the connection. However, since MP will be serving Booneville after abandonment, MKT suggests that shippers could request that carrier to restore the connection.

Finally, the Transportation Commission comments that it has analyzed the application and surveyed the shippers. According to its analysis, the principal shipper on the line was Westinghouse in Jefferson City, generating nearly half the local carloads MKT handled on the line in 1984 and 1985. The Transportation Commission states that Westinghouse is now using another rail carrier for its shipments. Other shippers contacted by the Transportation Commission were concerned about loss of service, but would not oppose abandonment.

DISCUSSION AND CONCLUSIONS

The statutory standard governing an abandonment is whether the present and future public convenience and necessity permit the proposed abandonment. 49 U.S.C. 10903. In implementing this standard, we must weigh the potential harm to affected shippers and communities against the present and future burden that continued operation could impose on the railroad and on interstate commerce. *Colorado v. United States*, 271 U.S. 153 (1926). Here the factors weigh in favor of abandonment.

The comments by the Transporation Commission are especially useful. As a result of its analysis, it concluded that MKT cannot economically maintain and operate the nearly 200-mile line to handle less than 1,000 cars annually. A low, scattered traffic base, the long length of the line, the high maintenance costs, and availability of transportation alternatives that mitigate loss of rail service were factors considered by the Transporation Commission in deciding not to oppose the abandonment. We agree with the Transportation Commission's conclusions.

We cannot precisely determine from the cost data what MKT's economic burden would be if it had to resume operation. Nevertheless, it is clear that the line has to be repaired before service can be resumed. Even if the repairs are made, MKT's subsidy year projection indicates that operation of the line to handle only local traffic would not be profitable. MKT would also incur an opportunity cost, adding to its economic burden.

On the other hand, the only shippers that oppose the abandonment are Union and MFA. Union's transporation needs are uncertain, however, for it has not used the line for that traffic for which it seeks the line be retained. The only traffic handled were nine carloads of poles in 1986. To require MKT to restore the line so Union can have standby rail service is not justified. On balance, we conclude that MKT's economic burden to provide stand by [*sic*] service to Union outweighs Union's uncertain needs for rail service.

MFA's objection that abandonment would result in higher fertilizer costs are not substantially supported with specific evidence. Moreover, we have recognized that abandonments may result in increased costs and inconvenience for shippers. However, these results are not sufficient to outweigh the detriment to the public interest of continued operation of uneconomic or excess facilities. *Chicago and North Western Transportation Company — Abandonment*, 354 I.C.C. 1

(1977). This is especially so where alternative transportation service exists.

We also reject the request that MKT reinstate the interchange with MP at Booneville. Having determined that any expenditures by MKT on the line would be an economic burden, we will not compel MKT to invest funds that it cannot possibly recover. The beneficiaries of an interchange would be shippers who would gain access to MP. Those shippers should first contact MP to ascertain what service arrangements MP is willing to provide them, and review 49 U.S.C. 10742.

We conclude that the economic burden on MKT from continued operation of the line outweighs inconvenience shippers may incur as a result of the abandonment. It has not been demonstrated that abandonment will have a serious adverse impact on the rural and community development of the area. Accordingly, we will authorize the abandonment.

LABOR PROTECTION

In approving this abandonment, we must ensure that affected rail employees are adequately protected. 49 U.S.C. 10903(b)(2). Thus, the concerns of RLEA, UTU and BLE will be satisfied. We have found that the conditions imposed in *Oregon Short Line, R. Co. — Abandonment — Goshen*, 360 I.C.C. 91 (1979) satisfy these statutory requirements. They will be imposed here

ENVIRONMENTAL ISSUES

Generally. On November 3, 1986, the Commission's Section of Energy and Environment (SEE) served an environmental assessment that examined the effects on the environment from abandonment of the line. SEE determined that abandonment and subsequent diversion of traffic would not

cause significant adverse impacts to the regional highway network, air quality, energy consumption and ambiant noise levels.

As a result of concerns raised by DNR over potential uses of the right-of-way and preservation of historic resources, further review was undertaken under section 106 of the National Historic Preservation Act, 16 U.S.C. 470, *et seq* (NHPA). SEE issued a second report on December 24, 1986, that evaluated the effects of abandonment and other potential uses of its right-of-way on rail structures, communities along the line and cultural resources within the rail corridor.

After receiving comments, SEE issued a third report on February 18, 1987, further considering historical preservation issues. SEE also reported that, at its request, two bridges and four depots were determined eligible for the National Register of Historic Places. In addition, the report considered the effect of abandonment and alternate rail uses on flora and fauna within and adjacent to the right-of-way under section 7 of the Endangered Species Act of 1973, 16 U.S.C. 1531-1543.

Also considered were the impacts on adjacent properties if the right-of-way were preserved for interim trail use. One comment raised a concern that the line be tested for chemical contaminants. SEE states that it has been advised by DOI that no hazardous waste sites are situated in the corridor. Also the chemicals used for vegetation control were administered in compliance with Environmental Protection Agency requirements. No residual contaminants would be present.

Trail use. DNR seeks to acquire interim use of the right-of-way as a trail under the Trails Act. DNR is an executive department of the State of Missouri and is authorized to acquire lands to be held for park purposes. Under its proposed plan, DNR will develop the right-of-way into a trail for public recreation use, and provide for management and maintenance of the trail as a park.

DNR asserts that the unique geological, biological, historical, archeological and cultural aspects of the right-of-way warrant its use as park. It asserts further that preservation of the right-of-way as a rail bank will preserve the corridor for possible future use.

DNR's proposal is supported by DOI, Commenters, and several private citizens. The National Park Service advises that the right-of-way parallels the route of the Lewis and Clark expedition. In 1978, the Lewis and Clark National Historic Trail was established to commemorate the expedition. Most of the Lewis and Clark Trail is designated as a water trail. The Park Service points out that the right-of-way can be developed as a land trail across two thirds of the State of Missouri. MKT states that it is presently negotiating a trails use agreement with DNR.

The interim trail use proposal is opposed by MFA and several adjoining landowners. Their first concern is that interim trail use would preclude reversion of their property interest in the right-of-way. They assert further that trail use of the right-of-way would expose adjoining landowners to increased criminal activity. They are also concerned that the State may not be able to develop and maintain the trail properly, adversely affecting the adjoining landowners.

Under our Trails Act procedures in 49 CFR 1152.29, when an interim trail use comment is filed in a request abandonment, the carrier must notify us, within 10 days after the Notice of Findings is issued, whether or not it is willing to negotiate an agreement. *See* section 1152.29(b)(5). If we are notified that the carrier is willing to negotiate an agreement, we will then issue a Certificate of Interim Trail Use or Abandonment (CITU), for the portion of the right-of-way covered by the agreement. *See* section 1152.29(c)(1). Here, MKT has stated it is already presently negotiating an agreement with DNR for interim trail use of the entire right-of-way. Thus, MKT need not notify us under section 1152.29 (b)(5). Unless a financial assistance offer is submitted under

section 10905 (which is found *bona fide* and the offeror is found financially responsible), and an agreement is reached for continued rail service we will proceed to issue a CITU for the entire line. Since the entire line is subject to interim trail use, we need not consider a trail use request by the City of St. Charles for the 7.34-mile segment between milepost 37.15 and milepost 44.49. If the trail use agreement between DNR and MKT does not cover this segment, MKT would have to agree to negotiate a trails use agreement with the City of St. Charles within the same period of time provided for in the CITU.

As noted above, some adjoining landowners object to trail use because it would prevent reversion of right-of-way property held by easement. As we noted in *Rail Abandonments — Use of Right-of-Way as Trails*, ___ I.C.C.2d ___ slip op. at 9 (served May 6, 1986) (*Trail Use*), Congress intended to preempt state property law that would otherwise authorize a reversion of the right-of-way upon discontinuance of service and thereby preserve transportation corridors for future reactivation of rail service. Allowing reversion of the right-of-way would subvert Congressional purpose in enacting the Trails Act.

Public Use Condition. An [*sic*] an alternative to trail use, DNR requests that we impose a public use condition for the entire line. SEE agrees that the right-of-way is suitable for public use if a trails use agreement is not reached. In *Trail Use, supra*, slip op. at 16, we determined that persons who seek trail use under section 1247(d) may also invoke the public use statute in section 10906 as an alternative.

A request for a public use condition must conform with our requirements in 49 CFR 1152.28(a)(2) by setting forth: (1) the conditions sought; (2) the public importance for the conditions; (3) period of time in which the conditions will be effective; and (4) justification of the time period. Since DNR has met these criteria, a public use condition will be imposed in the alternative, if no agreement is reached for

trail use. If a trail use agreement is reached on a portion of the right-of-way, MKT must still keep the remainder of the right-of-way intact for the rest of the 180-day period provided to permit negotiations for public use acquisition.

Two other requests have been received for public use conditions. The St. C & A proposes to acquire the right-of-way between milepost 26.92 in Machens and milepost 66 in Augusta for a tourist steam railroad. MoVal also proposes to acquire the segment between Booneville and Sedalia for a steam locomotive excursion line. Since we are granting DNR's request for a 180-day public use condition for the entire line, we need not separately rule on the requests of St. C & A or MoVal.

Other environmental issues. SEE analyzed the alternatives proposed for the line and concluded that the preferable alternative was interim trail use, because no adverse environmental consequences would result. Of prime concern was preservation of historic structure such as bridges and buildings. DNR's plan provides for preservation of these structures and their management. SEE determined that conversion of the right-of-way into a trail would preserve the cultural and archaelogical [*sic*] resources of the line. Trail use would also have the least adverse impact on fauna and flora. The right-of-way is rich in wildlife habitat that would best be preserved as a trail.

Regarding the impact of trail development on adjacent property owners, SEE states that while isolated incidents do occur, it is doubtful that the proposed trail will be more susceptible to these occurrences than other similar types of trails. SEE cites to surveys that evaluated recreational reuse of rail rights-of-way indicate that few problems occur on trails that are maintained and supervised. DNR's plan for development of the trail and subsequent management and maintenance should minimize adverse impact on adjacent landowners.

Under the CITU, MKT may salvage track and materials 30 days after the CITU is issued.[5] Salvage will not affect use of the right-of-way as a trail because bridges, culverts and other structure will remain intact. Nor will salvage of this segment require pre-salvage permits or consultation with Federal or State agencies. However, SEE recommends a condition that if during salvage, archeological resources, including scattered remains are uncovered, the State Historical Officer should be notified. That condition will be imposed.

The second alternative would be abandonment of the line. Abandonment would allow MKT to salvage the entire line with possible adverse effect on historical structures such as bridges. Also MKT will no longer be obligated to maintain structures, resulting in further adverse impact. Removal of bridges and other structures (that would be permitted following abandonment but would not be permitted during trails use) could have adverse short-term impacts on streams and waterways. Upon abandonment, portions of the right-of-way MKT held by easement will revert to adjacent landowners. After reversion, landowners could convert the right-of-way

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[5] SEE also recommends that MKT be permitted to salvage track and materials, but only between Booneville and Rhineland. This would, as a result, require MKT to leave intact for the period of the public use condition track and materials on the segments St. C & A and MoVal propose to acquire under the public use condition. We do not agree with SEE that is [*sic*] is necessary to require MKT to leave track and materials intact on these segments. Under the CITU (issuance of which will be delayed until this decision becomes final), MKT may only begin salvage of track and material 30 days after the CITU is issued. MKT should not be precluded from deriving immediate benefits for sale or reuse of the track and materials. Nevertheless, should St. C & A and MoVal intend to go forward with their proposals to acquire segments of the line for excursion trains under the public use conditions, they would have ample time to negotiate separately with MKT to acquire track and materials.

into other uses. Long-term adverse consequences could result if the alternative uses result in loss of wildlife habitat.

SEE recommends that abandonment be conditioned to require MKT to comply with section 106 of NHPA. It also recommends that, before salvage, MKT consult with the U. S. Army Corps of Engineers and appropriate Federal and State agencies and obtain permits if necessary. These conditions will also be imposed.

The third alternative considered by SEE is public use sale under section 10906. The segment SEE considers more likely to be involved in a sale for public use is between Booneville and Sedalia, where MoVal proposes to operate steam excursion trains. SEE notes that the segment sought by St. C & A between Machens and Augusta also for a steam excursion train was severely damaged by floods and would require extensive repairs. SEE asserts that a public use sale may have adverse environmental impacts on historical or archaelogical [*sic*] resources and water and wetland quality. These impacts would primarily result from salvage operations. It recommends that public use sale be subject to the same conditions it proposed for abandonment. We do not agree with this recommendation.

A public use condition under section 10906 is intended to facilitate negotiations for alternative public use of rights-of-way that we approve for abandonment. However, section 10906 does not provide us with authority to approve the sale of right-of-way following abandonment. Thus, we cannot subject the public use purchaser to environmental or other conditions. On the other hand, since the sale involves abandoned right-of-way, MKT would still be obligated to comply with environmental conditions imposed on the abandonment. Accordingly, no additional conditions need be imposed on public use sale.

The final alternative would be continued operation under the financial assistance procedures in 49 U.S.C. 10905. These procedures take precedence over interim trail use

under section 1247(d) and public use conditions under section 10906. SEE asserts that this alternative could involve adverse impacts on historical and archaelogical [*sic*] resources and recommends conditions to require compliance with section 106 of NHPA. Since the 10905 procedures can be invoked only if an offer of financial assistance is made, it is premature to consider imposing a condition now. We will consider imposing a condition if we issue a decision authorizing rail services to be continued under section 10905.

We agree with SEE's analysis and its conclusion that interim trail use will likely have the least extensive environmental impact. Nevertheless, by our imposition of the environmental conditions set forth below, any adverse environmental impacts resulting from either MKT's discontinuance (if an Interim Trails Use Agreement is reached) or its abandonment (if an Interim Trail Use Agreement is not reached), can be sufficiently mitigated.

We will impose the following environmental conditions: under section 10905.

1. If interim trail use agreement is reached under the CITU, MKT must notify the State Historical Preservation Office if, during salvage, archaelogical [*sic*] resources, including scattered remains, are uncovered.

2. If abandonment is effected under the CITU, MKT must (a) comply with the procedures in section 106 of NHPA and consult with the State Historical Preservation Officer for appropriate documentation of bridges and structures included in the National Register of Historical Places if they are to be demolished or substantially altered; and (b) consult with and obtain necessary permits from the U. S. Army Corps of Engineers and other Federal and State agencies before salvaging bridges and structures.

We find:

The present and future public convenience and necessity permit abandonment by MKT of the line of railroad described above, subject to: (1) the employee protective conditions in *Oregon Short Line R. Co. — Abandonment — Goshen*, 360 I.C.C. 91 (1979); (2) the terms and conditions of the CITU that will be issued; (3) the condition that MKT keep intact all the right-of-way underlying the track, including bridges and culverts, for a period of 180 days from the effective date of this decision to enable any State or local government agency or other interested person to negotiate the acquisition of the right-of-way for public use; and (4) the environmental conditions discussed above.

Abandonment of the line will not result in a serious adverse impact on rural and community development.

As conditioned, the action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. Our findings will be published in the *Federal Register* on March 16, 1987. An offer of financial assistance to allow rail services to continue must be received by MKT and the Commission within 10 days after publication. The offer must comply with 49 U.S.C. 10905 and 49 CFR 1152.27(b).

2. Offers and related correspondence to the Commission must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: "Rail Section AB-OFA".

3. Subject to the conditions set forth above, and provided that no offer for continued rail operation is received, a CITU will be issued. MKT must not effect abandonment or discontinuance of operations and track and material salvage until permitted to do so under the terms of the CITU.

4. If abandonment or discontinuance of operations is effected, tariffs applicable to the line may be cancelled upon

not less than 10 days notice to this Commission. When filing schedules cancelling tariffs applicable to this line, MKT must refer to the certificate by docket number and date.

5. This decision will be effective 30 days from the date of service.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons. Commissioner Simmons dissented with a separate expression. Vice Chairman Lamboley dissented and will submit a separate expression at a later date.

Noreta R. McGee
Secretary

(SEAL)

COMMISSIONER SIMMONS, dissenting:

The abandonment appears to be related to the pending merger between Union Pacific Corporation and Katy Industries. I believe that the abandonment application should have been filed in conjunction with this proposed consolidation. In this manner, the Commission can then determine the overall operating plans of the two rail carriers serving Missouri and analyze the total impact of a consolidated UP-MP-MKT on the rail needs of the Missouri shippers.

APPENDIX D

[DEED]

This Indenture, made on the 4th day of April A.D. 1884 by and between Bernard Maskey of the County of Warren and State of Missouri party of the first part, and the Cleveland, St. Louis and Kansas City Railway Company of the State of Missouri, party of the second part:

Witnesseth — That the said party of the first part in consideration of the sum of Three Hundred Dollars to him in hand paid, the receipt of which is hereby acknowledged, and in further consideration of a Railroad to be constructed and maintained by the said party of the second part, does by these presents give, grant, and quit claim unto the said party of the second part or their assigns, for the purpose of a right-of-way for a Railroad, and for no other purpose, a strip of land one hundred feet in width, as the same is or may be located by said Company for the purpose as aforesaid, being in front of and extending across the following described land, lying, being and situated in the County of Warren and State of Missouri, to wit: [metes and bounds description omitted] To have and to hold the same with all the rights, immunities, privileges and appurtenances thereto belonging unto the said party of the second part and to their assigns, for the purpose of establishing, constructing and maintaining a Railroad on the said land herein conveyed, and for no other purpose. Provided, that this shall in no case interfere with the occupancy and use of such land by or under the owner thereof until the construction of said road is commenced and as it may progress. In witness whereof the said party of the first part has hereunto set his hand and seal, the day and year first above mentioned.

[Signatures of grantors and notarization omitted.]

No. 89-____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

Maurice and Dolores Glosemeyer, et al.,
Petitioners,
vs.
Missouri-Kansas-Texas Railroad, et al.,
Respondents.

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

Donald A. Johnson being first duly sworn, deposes and says: I am a citizen of the United States and a resident of or employed in the county aforesaid. I am over the age of 18 years and not a party to the said action. My business addresss is 3550 Wilshire Blvd., Suite 916, Los Angeles, California 90010. On October 3, 1989, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action by placing three true copies thereof with first-class postage fully prepaid, in the United States post office mailbox at Los Angeles, California, in sealed envelopes addressed as follows:

EDWARD F. DOWNEY
ROBERT M. LINDHOLM
Assistant Attorney Generals
Post Office Box 899
Jefferson, City, MO 65102

HENRY MENGHINI
214 North Broadway
St. Louis, MO 63102

CHARLES MONTANGE
Attorney at Law
1400 Sixteenth St., N.W.
Suite 301
Washington, D.C. 20036

LOUISE F. MILKMAN
U.S. Dept. of Justice
10th and Pennsylvania Ave., N.W.
Washington, D.C. 20530

That affiant makes this service, for MICHAEL M. BERGER, Counsel of Record, of FADEM, BERGER & NORTON, Attorneys for Petitioners herein, and that to the best of my knowledge all persons required to be served in said action have been served.

Donald A. Johnson

On October 3, 1989, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Donald A. Johnson, known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

WITNESS my hand and official seal.

OFFICIAL SEAL
Theodore Matsuo Wilden
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires NOV 30, 1990

Notary Public in and for
said County and State